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NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

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Dated: September, 1983

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Question Presented

Whether the State of New Jersey, as part of a larger regulatory scheme whose purpose is to strictly and effectively control its sensitive and vulnerable casino industry, can require, consistent with federal labor policy, the registration of only those labor unions representing employees of operating casino hotels in Atlantic City and the removal from office in those specific unions of certain individuals who, after a formal hearing, are found disqualified by reason of certain statutorily-proscribed conduct, including enumerated criminal convictions and involvement with organized crime, which conduct would not necessarily disqualify union officials under federal labor law.*

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* The parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Martin Danziger, Acting Chairman; Donald Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner, constituting the Casino Control Commission, State of New Jersey; G. Michael Brown, Director, Department of Law Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey and Thomas Kean, Governor, State of New Jersey, Appellants herein; and Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, Appellees herein. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 331, were intervenors in the proceeding before the United States District Court for the District of New Jersey, but did not participate in the proceeding before the Third Circuit.

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IN THE

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G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

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On Appeal from the United States Court of Appeals for the Third Circuit

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3d Cir. 1983), and appears in the appendix hereto at App. A, 1a-77a.* The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982), and appears in the appendix hereto at App. B, 78a-128a.

The opinions of the New Jersey Casino Control Commission are not reported. They are reprinted in the appendix hereto at App. D, 131a-205a, and App. F, 208a-216a.

Jurisdiction

This is an action for declaratory, injunctive, and monetary relief, brought under 28 U.S.C. §§1331, 1337 and 1343 (1976 & Supp. V 1981), in which the District Court refused to preliminarily enjoin the enforcement of a portion of New Jersey's Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (App. B, 78a-122a).

On June 6, 1983 the Third Circuit reversed, holding that this statute was preempted by federal labor law, and was therefore invalid under the Supremacy Clause of the Constitution (App. A, 1a-37a; App. G, 217a-219a). A timely petition for rehearing or rehearing en banc was denied on June 30, 1983 (App. H, 220a-222a). A notice of appeal to

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* References to the Appendix, which is separately bound and which is filed jointly on behalf of all Appellants herein, are given in the following form: Each separate item is designated with a different letter, the pages of the entire Appendix being numbered consecutively throughout. Thus, page 1 of the Appendix is referred to as "App. A, 1a," etc.

this Court was duly filed in the Third Circuit on July 20, 1983 (App. I, 224a-229a).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the decision of the Third Circuit on appeal is conferred by 28 U.S.C. §1254(2) (1976). The following cases sustain the Court's jurisdiction to review the judgment on appeal in this case: *Belknap, Inc.* v. *Hale,* 103 S. Ct. 3172, 3176 n. 5 (1983); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301-303 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (1975); *Construction Laborers* v. *Curry,* 371 U.S. 542, 548-552 (1963).

Constitutional and Statutory Provisions Involved

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section is reprinted in full in the appendix hereto at App. J, 235a.

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), provides in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, exortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> > (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . .
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment . . .

This section is reprinted in full in the appendix hereto at App. K, 236a-237a.

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), provides in relevant part:

> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, exortion, embezzlement, fraud, grand lar-

> ceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is the later . . .

This section is reprinted in full in the appendix hereto at Ap L, 238a-240a.

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of Jan. 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter

> relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

This section is reprinted in full in the appendix hereto at App. M, 241a-245a.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. . . .

This section is reprinted in full in the appendix hereto at App. N, 246a-247a.

Section 86 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) is reprinted in full in the appendix hereto at App. O, 248a-255a.

Statement of the Case

By referendum held in 1976, the electorate of New Jersey amended their constitution to permit the legislative authorization of casino gambling, geographically limited to Atlantic City, in an effort to revitalize that decaying resort area as well as to increase revenues devoted exclusively to the State's elderly and handicapped residents. N.J. Const. (1947) art. 4, §7, ¶2(D) (West Supp. 1983-1984); *Knight* v. *City of Margate,* 86 N.J. 374, 380, 431 A. 2d 833, 836 (1981).

A unique industry, casino gambling has had a checkered history in this country, particularly in Nevada, where organized crime infiltrated and dominated the industry's early development. *The Development of the Law of Gambling; 1776-1976* at 437-467 (U.S. Dept. of Justice, 1977); *Marshall* v. *Sawyer,* 301 F. 2d 639, 648-654 (9th Cir. 1962) (Pope, J., concurring); *Nevada Tax Comm'n* v. *Hicks,* 73 Nev. 115, 310 P. 2d 852, 854 (1957). The cash nature of the business—that is, the enormous amount of money that flows daily through a casino operation and the large number of unrecorded transactions associated therewith—make the industry an extremely attractive and vulnerable target for organized criminal elements, who may use the proceeds obtained from gambling to finance illegal activities, infiltrate legitimate buinesses, and corrupt and subvert our democratic processes. *See Development, supra,* at 453-459; *United States* v. *Garrison,* 348 F. Supp. 1112, 1119 (E.D. La. 1972); Organized Crime Control Act of 1970, Statement of Findings and Purpose, *reprinted following* 18 U.S.C. §1961 (1976); (App. A, 64a-66a). Fully aware of this background, the public approved the legalization of gaming only after repeated assurances that New Jersey would have the strongest regulation of casinos in the world, that organized crime would be prevented from infiltrating the industry in any manner, and that only those individ-

uals of the highest character and integrity would be permitted to participate in casino operations (App. A, 66a).

Charged with the responsibility for implementing the constitutional mandate, the New Jersey Legislature had before it many studies regarding the possibilities for crime and corruption associated with the institution of this industry. *E.g. Second Interim Report of Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations on Casino Gambling by the New Jersey State Commission of Investigation* (April 1977). Responding to these dangers, and to foster public confidence and trust in its system of controls, the Legislature enacted the New Jersey Casino Control Act, a comprehensive licensing scheme "designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries." N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984). *See Knight* v. *City of Margate, supra,* 86 N.J. at 380-382, 431 A. 2d at 837.

To enforce this scheme, the Legislature created two separate and distinct State agencies: the Division of Gaming Enforcement ("Division"), a branch of the New Jersey Attorney General's Office, and the New Jersey Casino Control Commission ("Commission"), an independent *quasi*-judicial administrative body. Together, these agencies have the power and duty to investigate, license, supervise and pervasively control legalized gambling in all its aspects. N.J. Stat. Ann. §§50, 76, 80-95 (West Supp. 1983-1984).

With respect to the labor unions which might become involved in gaming, the Legislature was made aware of reports that such employee organizations had been a source of corruption in other jurisdictions. *Second Interim Report, supra,* at 46. In more specific terms, the State Commission of Investigation observed that there exist

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. [*Report and Recommendations, supra,* at 1-H].

To dampen the potentially explosive combination of labor racketeering and gambling, proposals were made that any labor organization representing casino employees should be required to register with the Casino Control Commission. Further, and only as a consequence of having engaged in certain statutorily proscribed conduct, the leadership of such organizations would be required to forfeit their offices or, having failed or refused to do so, their union would be barred from receiving dues or administering employee benefit plans.* *Report and Recommendations, supra,* at 1H-2H.

Heeding these warnings and recommendations, the Legislature enacted N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), which provides for the registration of labor organizations representing employees engaged in the casino industry, and which disqualifies from continuing to hold office those union representatives found to have en-

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* The provisions suggested were patterned after those embodied in the New Jersey Waterfront Commission Act, N.J. Stat. Ann. §§32:23-80, 80.2 (West 1963), which was enacted as part of a bi-state compact with New York in order to attack the problems of crime and corruption on the States' mutual waterfront. *See generally DeVeau* v. *Braisted,* 363 U.S. 144 (1960), discussed *infra.*

gaged in specifically delineated conduct prohibited by state law. In the event such a disqualified union official remains in office, the statute further mandates that the labor organization may not "receive any dues from any employee licensed or registered under [the Casino Control Act] and employed by a casino licensee or its agent, or administer any pension or welfare funds." N.J. Stat. Ann. §5:12-93(b) (App. N, 247a). Among the disqualifying conduct set forth in the statute, incorporating by reference N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984), are an individual's conviction for any of a series of enumerated crimes, and one's membership in, or operation as a strawman for, organized crime (App. O, 248a-253a, 254a).

In accordance with these statutory provisions, Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), an NLRB-certified labor union representing State-licensed employees in the New Jersey casino industry, registered with the Commission as did its president, Frank Gerace, and other officers, agents and principal employees. Thereafter, and as the result of its independent investigation, the Division filed reports with the Commission indicating possible grounds for disqualification of various union officers and agents based upon their criminal convictions and/or organized crime associations. A hearing before the Commission to consider the Division's allegations was scheduled to commence in September 1981.

On August 17, 1981, Local 54 and Gerace as plaintiffs filed in the United States District Court for the District of New Jersey a complaint for declaratory, injunctive, and monetary relief, together with a motion for a preliminary injunction. In support of their claims, the plaintiffs urged that the operation of N.J. Stat. Ann.

§5:12-93 was preempted by federal labor law, and that they would be irreparably harmed if the Commission hearing were permitted to proceed as then scheduled. Faced with the possible issuance of a temporary restraining order, the Commission agreed to defer its administrative hearing pending the District Court's ruling on the preliminary injunction issue.

On March 22, 1982, the District Court issued a ruling denying the plaintiff's motion for a preliminary injunction. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317 (D.N.J. 1982) (App. B, 78a-122a). While appeals of this ruling were pending in the Third Circuit, and because no preliminary injunction or injunction pending appeal had been granted, the Commission commenced its hearing on June 8, 1982. That proceeding, in which both Local 54 and Gerace fully participated, focused on the matters raised in the Division reports and concluded on September 13, 1982.

After reviewing the testimony of the witnesses and the documents entered into evidence, the Commission issued a final decision, dated September 28, 1982, declaring that certain union officers and agents—including Frank Gerace, the organization's president—were disqualified within the terms of N.J. Stat. Ann. §5:12-86 because of their criminal records and/or organized crime associations (App. D, 131a-197a). Accordingly, the Commission issued an order pursuant to N.J. Stat. Ann. §5:12-93 providing in substance that if any of the disqualified individuals remained as an officer, agent or principal employee of Local 54 as of October 12, 1982, the union would thereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and

employed by a casino licensee or its agent.* (App. E, 206a-207a). Enforcement of this order was enjoined by the District Court, awaiting resolution of the already-pending appeals (App. C, 129a-130a).

All parties subsequently filed with the Third Circuit a joint motion to supplement the record on appeal with the decisions and order of the Commission, which motion was granted. On June 6, 1983, the Court of Appeals issued its 2-1 decision in this matter. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger,* 709 F. 2d 815 (3d Cir. 1983) (App. A, 1a-77a).

The Third Circuit majority held in essence that the disqualification standards for union representatives and the dues collection ban established by N.J. Stat. Ann. §5:12-93 were both preempted by Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976), and that the prohibition on the administration of pension or welfare funds was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), §411, 29 U.S.C. §1111 (1976). The order appealed from was therefore reversed, and the case remanded to the District Court for the entry of an order enjoining the Commission and Division from taking any further action to enforce any part of N.J. Stat. Ann. §5:12-93 (App. A, 16a-37a).

In an opinion dissenting in part, Judge Becker agreed with the majority that ERISA precluded the Commission

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* On October 12, 1982, the Commission issued a supplemental opinion which concluded that the additional sanction available to it under N.J. Stat. Ann. §5:12-93, *i.e.* the prohibition on the administration of pension or welfare funds, would not be applied to Local 54 based on the record presented in this case (App. F, 208a-215a).

from regulating the management of welfare and pension funds. He disagreed, however, that the remainder of N.J. Stat. Ann. §5:12-93 was precluded, stating in part:

> It is indisputable that New Jersey's interest in comprehensive regulation of casino gambling is "deeply-rooted in local feeling and responsibility," . . . and that the restrictions on persons who may be associated with the industry—in whatever capacity—are of manifest importance to the State "as a protection to its citizens," . . . And while I acknowledge that invocation of the sanctions provided by section 93 of the Casino Control Act may curtail the full exercise of section 7 rights, given the unique dangers posed by criminal infiltration of casino gambling, I cannot say that New Jersey's interest is outweighed by "any harm to the regulatory scheme established by Congress." Rather, Congress' acquiescence in the legislation at issue in De Veau [v. *Braisted*, discussed *infra*] suggests a congressional perception that, in situations where the threat to the welfare to the state is so pervasive and so well-documented that the need for comprehensive state regulation is manifest, such regulation will be permissible even if it includes a component that directly restricts section 7 rights. I believe such situations to be rare, but I also believe that one is presented here [App. A, 72a-73a (citations and footnote omitted)].

A timely petition for rehearing or rehearing en banc was filed with the Third Circuit, which denied the petition by an evenly-divided vote of 5-5. (App. H, 220a-222a). In a separate statement on the rehearing petition, Judge Adams, who voted against rehearing, expressed his view that

> [t]his appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. . . .
>
> Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance by the nation's highest tribunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court. [App. H, 222a-223a].

The instant appeal to this Court followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The holding below, that New Jersey is preempted from prescribing strict standards of conduct for officials of labor unions engaged in its unique, localized casino industry, undermines priniciples of federalism and is inconsistent with prior decisions of this Court.

This case presents a pure question of law, *i.e.* whether N.J. Stat. Ann. §5:12-93—an anti-corruption measure which establishes certain standards of conduct for officials of labor unions representing State-licensed casino hotel employees in Atlantic City, New Jersey—is inexorably preempted by federal labor law.* As a result of the decision below enjoining enforcement of this key provision on preemption grounds, the ability of State regulatory agencies to ensure the integrity of New Jersey's casino gaming industry has been seriously undermined, and a historically documented avenue of organized criminal access into gaming has been wrested from State control. The question merits full briefing and plenary review because of its novelty, its obvious significance with regard to State law enforcement efforts, and its far-ranging implications for principles of federalism in the labor field.

The doctrine for determining whether State regulation is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1976), is well settled in this Court. If the conduct at issue is arguably prohibited or protected

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* Although the findings of the Commission in this particular case have been presented to the Court by way of background information, see App. D, 131a-197a; App. F, 208a-215a, the Third Circuit held New Jersey's statute to be preempted on its face (App. A, 37a), thus the issue before this Court is wholly independent of the manner in which the challenged statute was applied to the facts below.

by the Act, otherwise applicable State law and procedures are ordinarily preempted.* *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). Nevertheless, State regulation may still be sustained if the behavior to be regulated is of only peripheral concern to the federal law or touches interests deeply rooted in the local feeling and responsibility. *Belknap, Inc.* v. *Hale, supra*, 103 S. Ct. at 3176-3177. The question of whether State regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme estabilshed by Congress against the importance of the asserted action to the State as a protection to its citizens. *Local 926* v. *Jones*, 103 S. Ct. 1453, 1459 (1983).

With respect to Section 7 of the NLRA, 29 U.S.C. §157 (1976) (App. J, 235a), which in part guarantees workers the right "to bargain collectively through representatives of their own choosing," this Court held in *Hill* v. *Florida*, 325 U.S. 538 (1945), that a State was preempted under that provision from enforcing a law—applicable to all unions operating within the jurisdiction—which purported to establish broad qualification standards including "good moral character" for officials of such unions. Subsequent to *Hill*, however, both Congress and this Court have clearly demonstrated that the freedom of a group of employees to designate "representatives of their own choosing" is necessarily and obviously less than complete. Thus, reacting to

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* The NLRA has also been held to preempt State law relating to conduct that is neither protected nor prohibited, where it is determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). This branch of the preemption doctrine is not at issue in the present case. Compare *Belknap, Inc.* v. *Hale, supra*, 103 S. Ct. at 3177-3181.

the disclosures of the McClellan Committee regarding racketeering, crime, and corruption in the labor movement, see H.R. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2431, Congress itself established criteria disqualifying certain persons from holding union office as part of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (App. K, 236a-237a), and before that, acquiesced in state-imposed restrictions on that federal interest which were upheld in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960).

DeVeau involved a challenge to §8 of the New York Waterfront Commission Act, which established qualification standards for officials of waterfront unions more stringent than those applicable under federal law, and which prohibited the collection of dues by any union whose officers or agents were disqualified under the enumerated criteria. This statute had been enacted in furtherance of a Congressionally-approved bi-state compact between New York and New Jersey, designed to attack the problems of crime and corruption which had theretofore plagued the States' common waterfront. 363 U.S. at 144-151.

Relying upon the NLRA and *Hill* v. *Florida,* the appellant in *DeVeau* first argued that New York was preempted from impinging to any extent on the waterfront employees' freedom of choice in the selection of their representatives. 363 U.S. at 151-152. In an opinion for the four-Justice plurality,* however, Justice Frankfurter rejected any such absolutist approach:

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* Justice Brennan, the only remaining Justice who sat on the *DeVeau* Court, did not join in the plurality opinion, but instead authored a brief opinion concurring in the result. 363 U.S. at 160-161.

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power —to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [363 U.S. at 153].

Declining to find in Section 7 a congressional purpose to preclude the states from regulating at all—the NLRA "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" 363 U.S. at 152—the Court then examined the compatibility of the federal-state effort, concluding:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that

> there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of *adjustment* because of the interpendence of federal and state interests and of the interaction of federal and state powers. [363 U.S. at 152 (emphasis added)].

In the process of adjustment, the Court reconciled New York's intrusion on the federal right with its legitimate and compelling interest in combating local crime infesting the bi-state waterfront industry. 363 U.S. at 155. The Court concluded that this interest, reflected in the narrow and historically explained restrictions upon the choice of a bargaining representative embodied in Section 8 of the New York Waterfront Commission Act, neither frustrated nor contradicted the federal congressional purpose expressed in Section 7 of the NLRA. 363 U.S. at 154-155.

Similarly, as regards the appellant's second preemption argument, that §8 was impliedly barred to the extent that its disqualification provisions were at variance with those contained within §504(a) of the LMRDA, the Court was no more receptive, stating:

> The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through §8, namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. [363 U.S. at 156].

This circumstance, together with the absence of any preemptive language in §504(a) and the express disclaimer of

preemption found in §603(a), were all held to conclusively refute the notion that §8 of the Waterfront Act was preempted by the LMRDA. 363 U.S. at 156-157.

Here, the Third Circuit majority, in striking down Section 93's disqualification standards and dues collection prohibition, erroneously applied the type of NLRA/LMRDA absolutist preemption approach rejected in *DeVeau*, and mistakenly eschewed the careful weighing of federal and State interests mandated by *DeVeau* and other decisions of this Court as recent as *Belknap, Inc.* v. *Hale* and *Local 926* v. *Jones, supra.* To have invalidated those portions of §93 even after a careful, balanced consideration of the dual interests at stake would, we submit, have been error given the weighty and overriding concern of New Jersey in enacting a comprehensive regulatory scheme which seeks, among other things, to minimize the risk that organized crime would use labor unions as an entree into its fledgling casino gaming industry. But to have done so in utter disregard of the latter, disrupting legitimate state pursuits in the process, grossly betrays the most fundamental of preemption precepts governing the proper analysis of concurrent federal-state exercises of authority.

Preemption of the pension or welfare fund administration ban of N.J. Stat. Ann. §5:12-93 presents a closer question because of the existence of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976). Although ERISA, like the LMRDA, contains standards for the disqualification of fund administrators, 29 U.S.C. §1111 (1976) (App. L, 238a-240a), ERISA—unlike the LMRDA—also contains express language preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. §1144 (1976) (App. M, 241a). This lan-

guage has heretofore been accorded an expansive interpretation by this Court. See *Shaw* v. *Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

It is the position of the appellants that New Jersey's Casino Control Act does not "relate to" employee benefit plans in the manner contemplated by ERISA, but instead exists solely as a device to coerce the removal of disqualified officials from casino unions, and that the state disqualification standards should be considered as being supplemental to, rather than contradictory of, the federal criteria. Viewed in such a manner, N.J. Stat. Ann. §5:12-93 may pass muster using the same reasoning employed in *DeVeau*. See *Internat'l Longshoremen's Assn.* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1124-1125 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other gds.*, 642 F. 2d 666 (2d Cir.), *cert. den.*, 454 U.S. 966 (1981); *Local 1804* v. *Waterfront Comm'n*, 85 N.J. 606, 615-617, 428 A. 2d 1283, 1288-1289 (1981). Regardless of the merits, however, such an ERISA preemption issue has not previously been considered by this Court in the context presented by the instant case.

2. The holding below, that N.J. Stat. Ann. §5:12-93 is preempted in its entirety, is inconsistent with prior decisions of this Court.

N.J. Stat. Ann. §5:12-93 relies for its enforcement on five distinct steps in the regulation of casino unions: (1) registration of the union and its officials; (2) an investigation and report by the Division; (3) a hearing before the Commission; (4) a decision by the Commission on the the qualifications of union officials; and (5) the imposition by the Commission of sanctions upon the union to coerce

the removal of any officials found to be disqualified. In holding the statute preempted in its entirety, the Third Circuit majority failed to consider the possible preemption of each step as a separate issue, and reached a result seemingly at odds with the main decision upon which the majority purported to rely.

It is true that in *Hill* v. *Florida, supra,* this Court held a State's across-the-board union licensing statute to be preempted. Nevertheless, the Court was careful to point out in its opinion:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. [325 U.S. at 543].

Accord, Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450 (1945).

It may be in the present case that New Jersey is preempted from removing disqualified officials from casino labor unions, or from imposing sanctions upon unions designed to coerce such removal. It does not necessarily follow, however, that the State is similarly preempted from continuing to register unions, to investigate them, and to hold fact finding hearings about them, for whatever advantage such proceedings might provide the State in its overall regulation of this sensitive industry. Without re-

gard the ultimate conclusion on the preemption issue, this question itself appears worthy of fuller exploration and review.

3. The holding below satisfies any finality requirement that may exist under 28 U.S.C. §1254(2) (1976).

Although this Court has left open the question whether there exists a "finality" requirement in the context of an appeal brought pursuant to 28 U.S.C. §1254(2) (1976), *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 301-302, the judgment of the Court of Appeals in this case satisfies the tests of "finality" developed by the Court in prior decisions. First, the Third Circuit finally disposed of the federal preemption issue, *Belknap, Inc.* v. *Hale, supra,* 103 S. Ct. at 3176 n. 5, leaving no action of substance for the District Court but the mechanical entry of a judgment permanently enjoining New Jersey from enforcing its law, *Construction Laborers* v. *Curry, supra,* 371 U.S. at 551. Second, the preemption issue decided by the Third Circuit will survive and require decision regardless of the outcome of further District Court proceedings.* *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 480. Finally, if the Third Circuit was incorrect in invalidating N.J. Stat. Ann. §5:12-93, any delay in securing reversal of that decision irretrievably erodes New Jersey's ability to regulate its casino gaming industry by precluding, as a practical matter, the

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* Such proceedings will include determination of the plaintiffs' monetary damage claims. Although the plaintiffs have also advanced additional constitutional challenges to the New Jersey Casino Control Act on its face and as applied, such questions appear moot unless this Court reverses the Third Circuit's preemption decision (*See* App. A, 37a).

State's ability to expeditiously register and investigate the credentials of all unions who operate or seek to operate within that industry. This injury appears at least as serious as the "continued disruption of the city's internal economic affairs" relied upon by the Court to support appellate jurisdiction in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302. *See also Belknap, Inc.* v. *Hale, supra,* 103 S. Ct. at 3176 n. 5; *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 483-485; *Construction Laborers* v. *Curry, supra,* 371 U.S. at 550.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JOINT SUPPLEMENT TO JURISDICTIONAL STATEMENTS

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Appellants,

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HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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JOINT SUPPLEMENT TO JURISDICTIONAL STATEMENTS

This joint supplement to the jurisdictional statements previously filed in this matter is being submitted in response to a request from the Office of the Clerk of this Court. Specifically, the clerk's office requested an explanation of the fact that the caption on the jurisdictional statements and joint appendix thereto lists as appellants several public officials who were in office at the time this suit was filed but who are no longer in office.

When this suit was initially filed, the named defendants were: the New Jersey Casino Control Commission; the four sitting members of the New Jersey Casino Control Commission, to wit, Martin Danziger, Donald Thomas, Madeline McWhinney and Carl Zeitz; the New Jersey Department of Law and Public Safety, Division of Gaming Enforcement; the Director of the New Jersey Department of Law and Public Safety, Division of Gaming Enforcement, G. Michael Brown; and the Governor of the State of New Jersey, Brendan Byrne. At the time of the issuance of the opinion in the District Court, the caption was amended by the Court to eliminate Brendan Byrne as a defendant and substitute Thomas Kean, who was then and remains today the Governor of the State of New Jersey.

The caption as it appeared on the District Court opinion was utilized throughout the proceedings in the Third Circuit Court of Appeals and on the opinion issued by the Court of Appeals. This same caption was utililized in filing the jurisdictional statements and joint appendix thereto in this Court.[1] Although the composition of the New Jersey Casino Control Commission has changed, and although G. Michael Brown has been replaced as the Director of the

[1] On their jurisdictional statement, counsel for appellants Brown; Department of Law and Public Safety, Division of Gaming Enforcement; and Kean only captioned the parties which they represent.

New Jersey Department of Law and Public Safety, Division of Gaming Enforcement, appellants did not presume to alter the caption when they filed their jurisdictional statements and appendix with this Court. As explained in the jurisdictional statements, plaintiffs' complaint includes a claim for money damages, as to which there is a motion to dismiss on the ground of sovereign immunity pending in the District Court. Presumably, plaintiffs-appellees seek money damages against the named defendants, and, unless and until the damage claim is dismissed, defendants-appellants are uncertain of their authority to unilaterally alter the caption.

For the information of the Court, and in the event that the Court determines to amend the caption, the present members of the New Jersey Casino Control Commission are: Walter N. Read, Chairman, Carl Zeitz, Vice-Chairman, Don M. Thomas,[2] Commissioner, Joel R. Jacobson, Commissioner, and E. Kenneth Burdge, Commissioner; and the present Director of the New Jersey Department of Law and Public Safety, Division of Gaming Enforcement, is Thomas R. O'Brien.

---

[2] Commissioner Don Thomas was improperly captioned as Donald Thomas by the District Court and the Court of Appeals.

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OCTOBER TERM, 1983

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Appellants,

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 331,

Intervenor

v.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE MC WHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY

Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54,

Appellants in No. 82-5210

Appendix A

The Casino Control Commission,
Appellant in No. 82-5234

G. Michael Brown, Director, Dept. of Law and Public Safety, Division of Gaming Enforcement; and Thomas Kean, Governor,
Appellants in No. 82-5260

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY — CAMDEN

(D.C. Docket No. 81-2630)

Argued November 15, 1982

Before: GIBBONS, HIGGINBOTHAM and BECKER, *Circuit Judges*

(Opinion filed June 6, 1983)

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OPINION OF THE COURT

GIBBONS, *Circuit Judges:*

Hotel and Restaurant Employees and Bartenders International Union No. 54 (the Union) and its president, Frank Gerace appeal from an order of the district court denying their motion for a preliminary injunction

against enforcement of certain provisions of the New Jersey Casino Control Act, N.J. State Ann. 5:12-1 to -152 (West Supp. 1982).[1] The defendants are members of the New Jersey Casino Control Commission (the Commission) and officials of the New Jersey Department of Law and Public Safety, Division of Gaming Enforcement (the Division.) The Commission and the Division cross-appeal from the denial of their motions to dismiss the complaint. We hold that we lack appellate jurisdiction over the cross-appeals. With respect to the Union's appeal we vacate the denial of the motion for a preliminary injunction and remand for further proceedings consistent with this opinion.

I.

Parties and Proceedings in the District Court

The Union is an unincorporated labor organization within the meaning of section 2(5) of the National Labor Relations Act, (NLRA) as amended. 29 U.S.C. §152 (1976). It has approximately 12,000 members of whom over 8,000 are employed as waiters, waitresses, bartenders, cooks, kitchen help, housekeepers and other hotel service employees in those establishments in Atlantic City, New Jersey, licensed to operate gambling casinos. The Union has been duly certified by the National Labor Relations Board (the Board), pursuant to section 9 of the NLRA, 29 U.S.C. §159 (1973), as the representative of those employees for purposes of collective bargaining. It is similarly certified for employees of other businesses in southern New Jersey which do not hold gambling casino licenses. The Union participates on behalf of its members in the Hotel and Restaurant Employees and Bartenders International Union Pension Fund, and its

1. The district court opinion is reported. Hotel and Restaurant Employees and Bartenders International Union Local v. Danzinger (sic), 536 F.Supp. 317 (D.N.J. 1982).

Health and Welfare Fund. Both of these funds are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), as amended. 29 U.S.C. §1001-1381 (1976). President Frank Gerace is a trustee of those funds.

In 1977 the New Jersey Legislature passed the Casino Control Act (the Act), which authorizes the licensing of hotels in Atlantic City for casino gambling. That act establishes a Casino Control Commission with broad regulatory authority over casinos and related industries. N.J.Stat. Ann. 5:12-63 to -75 (West Supp. 1982) It also establishes in the Department of Law and Public Safety, which the Attorney General heads, a Division of Gaming Enforcement, charged with responsibility for investigating all applicants for licenses, certificates, or permits, and prosecuting before the Commission or in the state criminal courts all proceedings for violation of the Act or regulations promulgated under it. N.J.Stat. Ann. 5:12-76 to -79 (West Supp. 1982). The Act requires licensing not only of casinos, but of casino key employees (supervisors), N.J.Stat. Ann. 5:12-89 (West Supp. 1982), and of casino employees. N.J.Stat. Ann. 5:12-90 (West Supp. 1982). Casino hotel employees include those performing "service or custodial duties not directly related to operations of the casino, including, without limitations, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." N.J.Stat. Ann. 5:12-8 (West Supp. 1982). For casino hotel employees the Act requires registration. N.J.Stat. Ann. 5:12-91 (West Supp. 1982). Section 86 of the Act lists criteria for the disqualification of casino licensees, and the section dealing with registration of casino hotel employees authorizes the Commission to revoke, suspend, limit or otherwise restrict the registration of any such employee who would be disqualified for a license. N.J.Stat. Ann. 5:12-86, -91(b) (West Supp. 1982). All industries offering goods or services to the casinos must

also be licensed and are subject to the disqualification criteria of section 86. N.J.Stat. Ann. 5:12-92 (West Supp. 1982).

Particularly relevant to this case is the provision in section 93 of the Act, requiring that every labor organization seeking to represent employees licensed or registered under the Act and employed at a casino hotel register with the Commission annually. N.J.Stat. Ann. 5:12-93(a) (West Supp. 1982). Section 93 also provides:

> No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982). Thus section 93 cross-references to the disqualification criteria in section 86. The criteria include convictions of a list of designated offenses or "any other offense which indicates that licensure of the applicant would be inimical to the policy of this act and to casino operations." N.J.Stat. Ann. 5:12-86(c)(4) (West Supp. 1982). They also include:

> The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a

> manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders.

N.J.Stat. Ann. 5:12-86(f) (West Supp. 1982). A union may be disqualified under section 93, therefore, if an officer, agent or principal employee is an "associate of any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of [New Jersey]."

In 1978 the Union filed with the Commission the annual registration statement required by section 93(a). Thereafter the Division of Gaming Enforcement conducted an investigation, and reported to the Commission that in its view Frank Gerace, President, Robert Lumino, Secretary-Treasurer, and Frank Materio, Grievance Manager, were disqualified under the criteria of section 86. The Division requested the Commission to prevent the Union from collecting dues from or administering pension or welfare funds on behalf of employees in the casino hotels. The Commission determined to hold a hearing on the Division's report. At a prehearing conference on June 1, 1981 counsel for the Union raised objections to the constitutionality of sections 86 and 93. The Commission requested briefing on the question of its authority to rule upon such objections, and on August 5, 1981 it ruled that since it was not a court it lacked competence to consider them. The Commission then fixed September 9, 1981 as the date for commencement of an evidentiary hearing on disqualification. Counsel for

the Union advised the Commission of his client's intention to file a challenge to the constitutionality of sections 86 and 93 in the federal court before that date.

On August 17, 1981 the Union and Mr. Gerace filed a verified complaint. The complaint alleged that the Division was seeking to have the Commission impose the sanctions set forth in section 93(b) of the Act, but that section 93 was an attempt to regulate areas which are preempted by the NLRA and by ERISA. It alleged, further, that section 93 impermissibly interferes with federally guaranteed rights of employees of the casino and casino hotel industries with respect to the selection of their exclusive collective bargaining agent. An amended complaint alleged that sections 93 and 86 are preempted by the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), as amended. 29 U.S.C. §§401-530 (1976). The complaint also alleged that section 86(f) is both unconstitutionally overbroad and unconstitutionally vague and thus violates the first, fifth and fourteenth amendments of the Constitution. The plaintiffs sought a declaratory judgment that both sections are void, as well as temporary and permanent injunctive relief against the enforcement of section 93. Plaintiffs also filed a motion seeking preliminary injunctive relief, supported by an affidavit alleging that it would be irreparably injured by being forced to participate in proceedings in violation of section 7 of the NLRA.

The Commission acceded to a request by the district court that it defer commencement of its disqualification hearing until the motion for a preliminary injunction was decided. On December 1, 1981 a hearing was held on that motion. At the hearing the Union presented affidavits together with supporting exhibits which were accepted in evidence as uncontroverted by the Commission or the Division. Defendants also placed certain exhibits in evidence. Thereafter both the Commission and the Division moved to dismiss the complaint "on the ground of abstention." On March 22, 1982 the district

court considered both motions in an opinion containing findings of fact and conclusions of law. The court's findings of fact are quoted in the margin.[2]

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2. The court found:

The facts essential to the determination of the motion are as follows:

1. Plaintiff Hotel and Restaurant Employees and Bartenders International Union Local 54 is an unincorporated labor organization within the meaning of §2(5) of the National Labor Relations Act, as amended, *infra*, representing, *inter alia*, about 8,000 licensed employees of the casinos and casino hotels in Atlantic City, New Jersey, in collective bargaining and other matters affecting employer-employee relations. Plaintiff Frank Gerace is president of Local 54.

2. Frank Gerace is a trustee of the Hotel Employees and Restaurant Employees and Bartenders International Union Pension Fund, as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Health & Welfare Fund. Local 54, through its officers, participates in the operation of these funds, both of which are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974, *infra*. (Plaintiffs' Exhibit 5).

3. Local 54 filed its annual registration statement as required by the Casino Control Act in 1978. On May 12, 1981, the defendant Division of Gaming Enforcement, following its investigation of the applicant, stated its objections to the application. (Plaintiffs' Exhibit 2).

4. The Casino Control Commission thereupon ordered that hearings on the subject of Local 54's registration commence on September 9, 1981. (Affidavit of Frank Gerace, August 17, 1981, ¶2; Defendants' Exhibit 3).

5. Local 54 has posed to the Casino Control Commission certain of its objections to the registration requirement, the conduct of its officers being the subject of a hearing, and to the possibility that the sanctions of §93 of the Casino Control Act may be imposed. (Plaintiffs' Exhibit 4). The Commission has held that it is without jurisdiction to reach the constitutional objections to §93. (Plaintiffs' Exhibit 4).

6. The Casino Control Commission has adjourned the hearing scheduled for September 9, 1981, pending determination of the instant motion for preliminary relief. (Defendants' Exhibit 3).

536 F.Supp. at 324.

Appendix A

In support of their motions to dismiss, the Commission and the Division relied upon *Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Although their motions sought an outright dismissal of the complaint, they also relied on Railroad *Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The district court stated that neither the Younger nor the Burford doctrines applied and that the nature of the Union's challenges to sections 93 and 86 precluded Pullman abstention. No order was entered denying the defendants' motions.

In ruling on the motion for a preliminary injunction the district court opined that the plaintiffs were not likely to succeed on the merits of their claim that section 93 of the Act is preempted by the LMRDA. The court had more difficulty with the contentions that the NLRA and ERISA were preemptive, but concluded that because of the discretion vested in the Commission by virtue of the last sentence in section 93(b), in actual application no conflict might arise between that section and those federal statutes.[3] The court was also skeptical of the merits of the Union's contentions that section 86, incorporated by reference in section 93, was unconstitutionally overboard or unduly vague. Summarizing, the court concluded:

> In view of all of these considerations, the court concludes that plaintiffs are not likely to succeed on the merits of their vagueness claim. Nor are they likely to succeed on the merits of their related overbreadth and First Amendment claims. The absence of any irreparable harm *pendente lite* has already been discussed in connection with the discussion of plain-

3. "The commission may for the purpose of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982).

tiffs' preemption claims, as has the conclusion that the balance of equities and the public interest weigh against the issuance of a preliminary injunction.

536 F.Supp. at 338. An order was entered on March 22, 1982 denying the motion for a preliminary injunction. The plaintiffs appealed. Their application, pursuant to Fed. R. App. P. 8(a) for an injunction pending appeal was initially denied in the district court, and here.

Because no preliminary injunction was entered, the Commission went forward with a disqualification hearing. Its subsequent actions were called to the attention of the district court in a motion, pursuant to Fed. R. Civ. P. 62(c), for reconsideration of the issuance of an injunction pending this appeal. On September 28, 1982 the Commission issued an opinion in which it found that President Frank Gerace, Executive Board member Frank Materio and Business Agent Karlos LaSane were disqualified under the criteria of section 86. Gerace and Materio were held to be disqualified under section 86(f) because they were associated with members of organized crime in a manner inimical to the policy of the Act and to gaming operations. LaSane was disqualified under section 86(c) because he had been convicted in 1973 of extortion from persons doing business with Atlantic City while he was a City Commissioner. The Commission concluded that the Union should be barred from collecting dues from its members employed in the casino industry. The district court ordered that the Commission be enjoined, pending this appeal, from taking any steps to enforce section 93 or its September 28, 1982 decision. That order did not prohibit the Commission from rendering an opinion interpreting section 93(b) with respect to the Union's administration of pension and welfare funds. On October 12, 1982 the Commission issued an opinion holding that the dues collection prohibition and the welfare fund prohibition could be applied singly or

jointly, but that in this instance it would not invoke the latter sanction.[4]

The present status of the case, therefore, is that the district court denied a preliminary injunction against enforcement of section 93 and denied a Rule 8(a) motion for such an injunction pending appeal, but on a Rule 60(b) motion reconsidered the Rule 8(a) motion and granted an injunction pending appeal, which will expire by its terms upon the entry of a judgment disposing of the Union's appeal. Except for that injunction, the Union would now be prohibited from collecting dues from its casino hotel members unless it replaced its President, its Business Agent, and a member of its Executive Board.

II.

The Cross-Appeals

Neither the Commission nor the Division contends that the denial of a Rule 12(b)(6) motion is anything but an interlocutory order. Both contend, however, that they can appeal by virtue of 28 U.S.C. §1292(a)(1). Their theory is that "[a]n appeal from an injunctive order supports review of an order denying a motion to dismiss for failure to state a cause of action, for improper venue, for lack of jurisdiction, and for lack of standing." 9 *Moore's Federal Practice* §110.25, at 271 (2d ed. 1970) (footnotes omitted). There are several difficulties with applying that theory in this case. In the first place, the Commission and the Division are the prevailing parties in the district court. They simply are not aggrieved by the denial of the preliminary injunction. Moreover no order has been entered on the motions to dismiss. The trial court's opinion

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4. The October 12, 1982 order obviously was not called to the district court's attention in connection with the Rule 60(b) motion, but it is a matter of public record which the parties called to our attention and of which we can properly take judicial notice.

discussed these motions, but appeals do not ordinarily lie from opinions. See Fed. R. Civ. P. 54(a), 58. Finally, even if we were to treat the opinion as if it were an order, in this circuit it would not be reviewable in conjunction with an appeal from even the grant of a preliminary injunction. *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982). Thus the Union's contention that the cross-appeals should be dismissed must prevail. Neither section 1291 nor section 1292(a)(1) provides for appellate jurisdiction over them, and they must be dismissed.

We can, of course, consider the contention that the district court should have dismissed the complaint on the authority of *Younger v. Harris*, 401 U.S. 37 (1971), or *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), as an alternative ground for affirmance of the denial of preliminary injunctive relief. *See New Jersey Education Association v. Burke*, 579 F.2d 764, 766 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978). Thus no significant prejudice to the state's interests occurs in this instance from its inability to appeal at this time from the trial court's inaction on its motion to dismiss.

III.

New Jersey Regulation of Gambling

Prior to 1844 New Jersey, like many states, was so tolerant of gambling that it regularly authorized lotteries as a means of raising revenues for public or charitable purposes.[5] The Constitution adopted that year, however, included the provision that "[n]o lottery shall be authorized by this state; and no ticket in any lottery not authorized by a law of this state shall be bought or sold within the state. . . ." N.J. Const. of 1844, art. 4, §7, ¶ 2. That provision was amended in 1897 to read:

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5. *See* Justice Bodine's discussion of the early common law in Dombrowski v. State, 111 N.J.L. 546, 168 A. 722 (S. Ct. 1933). Note, *The Casino Act: Gambling's Past and the Casino Act's Future*, 10 Rut.-Cam. L. J. 279 (1979).

> No lottery shall be authorized by the legislature or otherwise within this state, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, book-making or gambling of any kind be authorized or allowed within this state, nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished.

From 1897 to 1939 the flat prohibition against legalizing any form of gambling was the constitutional public policy of the state. In 1939, however, New Jersey, looking covetously at the potential state revenue which might be derived from pari-mutuel betting, amended art. 4, §7, ¶2 so as to make it lawful "to hold, carry on, and operate in this State race meetings whereat the trotting, running or steeplechase racing of horses only may be conducted between the hours of sunrise and sunset on week days only and in duly legalized race tracks, at which the pari-mutuel system of betting shall be permitted." 1939 N.J. Laws at 1063. The 1939 amendment put the state in the position of having an interest in gambling revenues for the first time since prior to 1844.

When the Constitution of 1947 was adopted it included the general provision that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by the legally qualified voters of the State voting at a general election. . . ." N.J. Const. of 1947, art. 4, §7, ¶2. An exception authorized bona fide veterans, charitable, educational, religious or fraternal organizations, civic or service clubs, volunteer fire companies and first-aid or rescue squads to conduct bingo or lotto games and to hold raffles. Thus the pre-1844 prac-

tice of supporting worthwhile social activities by gambling revenue was substantially restored. In 1969 art. 4, §7, ¶2 was amended to authorize the conduct of State lotteries "when the entire net proceeds of any such lottery shall be for State institutions, [sic] State aid for education." For the statutory enactments pursuant to this authorization, see N.J.Stat. Ann. 5:9-1 to -25 (West 1973). Other forms of gambling still required approval in a statewide referendum. The voters were generally unreceptive.

In 1976, however, the Constitution was amended once more, permitting the Legislature to authorize by law the establishment of gambling houses or casinos in the City of Atlantic City, so long as the authorizing legislation "shall provide [that] the State revenues derived therefrom . . . be applied solely for the purpose of providing reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of, eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature may by law provide." N.J. Const. of 1947, art. 4, §7, ¶2.D. Pursuant to that authorization the Legislature adopted the statute containing sections 93 and 86.

Unlike the State Lottery Law, N.J. Stat. Ann. 5:9-1 to -25 (West 1973 & Supp. 1982), under which the Department of the Treasury is directly in the lottery business, the Casino Control Act authorizes erection of casinos by private investors. The State, however, has a direct financial stake in their operation, since it imposes an annual tax of 8% of gross revenues. N.J. Stat. Ann. 5:12-144 (West Supp. 1982). Moreover the statute regulates the hours of casino operation, N.J. Stat. Ann. 5:12-97(a) (West Supp. 1982), and contains detailed provisions encouraging reinvestment of casino profits in the expansion of the industry. N.J. Stat. Ann. 5:12-146, -147 (West Supp. 1982) Regulation of the industry is financed by license and registration fees. N.J. Stat. Ann. 5:12-139 to -143 (West Supp. 1982) Since the casino ho-

tels are privately owned and managed, the State obviously does not claim that they are exempt under section 2(2) of the NLRA, 29 U.S.C. §152(2) (1976). Nevertheless the state's interests and those of the employers here involved are closely aligned economically.

IV.
Federal Regulation of Collective Bargaining

Under the regime of *Adair v. United States*, 208 U.S. 161 (1908), state law interference with efforts of employees to choose their own collective bargaining representatives was largely beyond the reach of congressional enactments, and state law regularly interfered. New Jersey was no exception. *See, e.g., Kinane v. Fay*, 111 N.J.L. 553, 168 A. 724 (S.Ct. 1933); *Brennan v. United Hatters of North America*, 73 N.J.L. 729, 65 A. 165 (S.Ct. 1906) and cases cited therein. In 1930, however, the Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), effectively overruled *Adair* when it held that the Railway Labor Act of 1926 was constitutional.[6] Not long thereafter Congress began the modern era of the law of labor relations when in section 7(a) of the National Industrial Recovery Act (NIRA) it provided:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or

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6. Robert L. Hale, Professor of Law, Columbia University, in hearings on the NLRA explained that although *Adair* was not explicitly overruled by *Texas & New Orleans Railroad Co.*, that was the practical effect of the decision. *To Create a National Labor Board, Hearings on S. 2926 Before The Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 52 (1934) (statement of Robert L. Hale, Professor of Law, Columbia University).

> their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Pub. L. No. 73-67, §7(a), 48 Stat. 198 (1933). Borrowed from a similar provision in the Railway Labor Act, section 7(a) was intended to establish a federal law right to choose collective bargaining representatives. The NIRA, however, contained no effective enforcement mechanism, and experience under it led to the adoption, in 1935, of the NLRA. In that statute Congress carried forward the federal policy announced in the NIRA. It "declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, selforganization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151 (1976). The first clause of section 7(a) of the NIRA was substantially copied in section 7 of the NLRA:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

49 Stat. 449, 452 (1947); 29 U.S.C. §157 (1976). But whereas the clause in section 7(a) of the NIRA dealing with coercion of employees in the choice of collective bargaining representatives was largely precatory, section 8 of the NLRA made all forms of such coercion unfair labor practices. 49 Stat. 449, 453 (1947); 29 U.S.C. §§159, 160 (1976). Moreover the NLRA created the National Labor Relations Board, gave it authority in section 9 to certify designated collective bargaining representa-

tives, and power in section 10 to prevent unfair labor practices. 49 Stat. 449, 453 (1947); 29 U.S.C. §§159, 160 (1976). Thus ever since the enactment of the NLRA employee self-organization and employee free choice has been a federal statutory right, the interference with which is an unfair labor practice which the National Labor Relations Board has power to prevent. Moreover, as originally enacted the Board's section 10 enforcement power was "exclusive, and . . . not affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." 49 Stat. 449, 453 (1947).

When the NLRA was under consideration opponents of the legislation called to the attention of Congress the issue of labor racketeering.[7] Thus Congress was not unmindful of the generic problem which section 93 of the Casino Control Act now addresses in a specific industry. Despite these rather forceful expressions from opponents of the NLRA, however, the 74th Congress placed no limitations in section 7 or section 8 upon the persons who could be chosen as collective bargaining representatives. Considering the extent to which the criminal law had been used, prior to 1935, against labor organizers, a history of which no member of Congress could have been ignorant, the omission of "racketeering" limitations on qualifications for designation as a collective bargaining representative plainly was a conscious legislative choice both in the 1933 NIRA and in the 1935 NLRA.

Before Congress next turned major attention to the subject of collective bargaining the Supreme Court was

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7. *Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 606-07, 645-46, 745-52, 979 (1934) (statements of William B. Donham, Dean, Harvard Business College; Howard Goodman, Manager, Goodman Manufacturing Co.; Charles R. Hook, Pres., American Rolling Mill, Co.; William F. Dunne, Member, National Committee of the Trade Union Unity League).

presented with the question of whether state law could determine ineligibility of collective bargaining representatives. In 1943 Florida passed a statute providing for the licensing of union business agents and prohibiting the licensing of persons who were not citizens for more than 10 years, who had been convicted of a felony, or who were not of good moral character. 1943 Fla. Laws C. 21968. The Florida statute was enacted after the Supreme Court held in *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740 (1942), that section 7 of the NLRA did not preempt state prohibition of mass picketing, threats of personal injury, or property damage. When an employer refused to bargain with an unlicensed business agent, the Board held that it committed an unfair labor practice. *In the Matter of Eppinger & Russel Co.*, 56 NLRB 1259 (1944). Meanwhile in a state court the Attorney General of Florida sought injunctive relief against a union and a business agent functioning as such until licenses were obtained. The highest court of Florida enforced the statute. *Hill v. State*, 155 Fla. 254, 19 So. 2d 857 (1944). On the authority of its classic statement in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), with respect to the preemptive effect of federal legislation, the Supreme Court reversed, holding:

> Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of contempt for doing what the act of Congress permits him to do. Furthermore, he could, under §14 of the state law be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legisla-

> tion. We hold that §4 of the Florida Act is repugnant to the National Labor Relations Act.

Hill v. Florida, 325 U.S. 538, 542 (1945). The Court also held that, consistent with the NLRA, the Union could not be enjoined from functioning as a collective bargaining representative for failing to obtain a state license and file an annual information return. 325 U.S. at 543. Chief Justice Stone concurring did not agree that the states could not require that labor unions or their agents to obtain licenses or file reports. "But," he observed, "it is quite another matter to say that a state may fix standards or qualifications for labor unions and their officers and agent which would preclude them from being chosen and from functioning as bargaining agents under §7 of the National Labor Relations Act." 325 U.S. at 545. That is precisely what New Jersey has done in section 93. Thus the *Hill* Court's holding on the preclusive effect of section 7 is controlling unless it has been modified by subsequent federal legislation or overruled by the Supreme Court.

Congress had not yet reentered the field when the Court had a further opportunity to consider its position that the NLRA preempted state law respecting bargaining representatives. The occasion arose because of the Board's discretionary rulings, prior to the decision in *Packard Co. v. Labor Board*, 330 U.S. 485 (1947), that although foremen were covered by section 7 they were not, generally speaking, an appropriate bargaining unit. In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), the Court on the authority of *Hill v. Florida* held that a state labor board could not exercise jurisdiction to consider whether foremen bargaining units would be recognized. Justice Jackson reasoned:

> If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the dis-

> cretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict."

330 U.S. at 776. Just such a mischievous conflict occurs in the instant case, since the Board has certified the Union while the Commission's proposed order will render the union ineffective as a bargaining agent unless it dismisses three key officers. The Board has consistently asserted jurisdiction over the casino industry. *El Dorado Club*, 151 N.L.R.B. 579 (1965) (Nevada's extensive regulation of gambling industry and concern over criminal infiltration are not reasons for declining jurisdiction under section 14(c)(1) of the NLRA).

In 1947, the *Hill* and *Bethlehem Steel* cases were the Court's definitive interpretations of the preemptive effect of sections 7 and 8. Thus, when Congress undertook a major revision of the NLRA, it was presented with an occasion to reconsider these holdings. In the Labor Management Relations Act (LMRA), enacted that year, both section 7 and section 8 were amended. In the former, as amended, Congress carried forward the language from the NIRA and the NLRA establishing federal rights of employees to form unions and to bargain collectively through representatives of their own choosing, but added a correlative "right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as recognized in section 8(a)(3)." Labor Management Relations Act of 1947, Pub. L. No. 101, ch. 120, §7, 61 Stat. 136 (1947). Section 8 was amended by the addition of a subsection dealing with unfair labor practices by unions, and the Board was given jurisdiction over these. Section 10 of the NLRA was amended by the elimination of the exclusive jurisdiction provision, and instead the Act provided that:

> [The Board's] power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. §160(a) (1976). Congress also addressed the union racketeering issue, by making it unlawful for employers to pay or labor representatives to receive money or other things of value. That prohibition was made enforceable by federal criminal and civil provisions. Pub. L. No. 101, ch. 120, §302, 61 Stat. 136 (1947); 29 U.S.C. §186 (1976). Moreover, certain boycotts and other unlawful combinations were proscribed. Pub. L. No. 101, ch. 120, §303, 61 Stat. 136 (1947); 29 U.S.C. §§186-187 (1976).

The effect of the 1947 legislation was to confirm substantially the Court's interpretation of the preemptive effect of sections 7 and 8. The amendment to section 10, permitting the Board to cede jurisdiction in certain cases to state agencies, addressed the so-called no-man's land problem of NLRB declination of jurisdiction and state agency lack thereof which the *Bethlehem Steel* case created. Such deferral to state agencies could occur, however, only if the state agency was prepared to apply the standards of federal law. But while dealing explicitly with labor racketeering issues in sections 302 and 303 of the LMRA, and while amending section 7, Congress

made no change in the federal law respecting eligibility to act as a bargaining representative. The reenactment of the original section 7 as the first clause in the amended section 7 must be considered to be a Congressional approval of the holding in *Hill* that state law on eligibility is preempted. *Merrill, Lynch, Pierce, Fenner, & Smith v. Curran,* U.S. , 102 S.Ct. 1825 (1982).

When presented with the question, the Court held that "the [1947] proviso to §10(a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." *Guss v. Utah Labor Board,* 353 U.S. 1, 9 (1953). The Court had in the interim decided in *Automobile Workers v. O'Brien,* 339 U.S. 454 (1950), that the strike-vote provisions of the Michigan Labor Mediation Law were preempted by section 7, and in *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board,* 340 U.S. 383 (1951), that section 7 preempted the Wisconsin Public Utility Anti-Strike Law. The *Guss* Court, in support of its holding that the deferral proviso in section 10(a) is the exclusive means whereby state law can be permitted to operate, quoted approvingly this observation in *Amalgamated:*

> The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board,* 330 U.S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative.

353 U.S. at 9 (quoting 340 U.S. at 397-98). Five years after the *Guss* decision, in holding that a state court could not set aside a collective bargaining agreement violative of an Ohio antitrust law, the Court reiterated the authority of *Hill v. Florida, Automobile Workers v. O'Brien*, and *Amalgamated Association v. Wisconsin Employment Relations Board. See Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 296 (1959). Thus as the federal law stood after the enactment of the LMRA there could be no room for avoiding, in a case such as this, the binding authority of the *Hill* decision.

The same year that the Court reiterated the *Hill* preemption rule in *Teamsters Union v. Oliver* Congress turned its attention once again to the collective bargaining relationship. In the Labor Management Reporting and Disclosure Act (LMRDA) it dealt even more explicitly than in section 302 of the LMRA with the problems of corruption within union leadership and of undemocratic conduct of internal union affairs. Pub. L. No. 86-257, 73 Stat. 519 (1959). The 1959 Act imposed elaborate reporting requirements and enacted a "bill of rights" for members. Title VII of the LMRDA amended the LMRA in certain respects, none of which are here relevant. Section 603(b) provides that nothing in the first six titles should be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." Pub. L. No. 86-257, §603(b), 73 Stat. 519 (1959); 29 U.S.C. §523(b) (1976). The LMRDA also established a number of criminal sanctions. *See, e.g.*, 29 U.S.C. §§501, 502, 503-522 (1976). Because many of the proscribed activities were already crimes under state law and not protected activities under section 7 of the NLRA as amended, Congress decreed in section 604 of the LMRDA that it would not "impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of

narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any such crimes." 29 U.S.C. §524 (1976). This provision was included in recognition of the holdings in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that in the field of labor law preemption might apply not only with respect to activity protected by section 7, but also with respect to activity prohibited by a federal regulatory scheme. Those cases also influenced Congress to include in section 603(a) of the LMRDA a savings clause preserving state law remedies for breach of fiduciary duties. 29 U.S.C. §523(a) (1976). Finally, and of most immediate significance, Congress in section 504 of the LMRDA enacted for the first time a provision dealing explicitly with disqualifications for holding union office.[8] But while section 603(a) preserves state law remedies for breach of fiduciary duties, and section 604 preserves the states' traditional authority to enact garden variety criminal laws, there is no equivalent savings provision in section 504.

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8. §504. Prohibition against certain persons holding office

(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve —

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

Thus in 1959 Congress, fully aware of the holding in *Hill v. Florida* that section 7 preempted state disqualification laws, of the rule of statutory interpretation applied in *Amalgamated Association of Employers v. Wisconsin Employment Relations Board* and *Guss v. Utah Labor Board* that Congressional deference to state law must be specific, and of the holdings in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that even state regulation of activity prohibited by federal law is preempted, chose to legislate on the subject of

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NOTE — *(Continued)*

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (a) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Penalty for violations

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

29 U.S.C. §504 (1976).

union officer disqualification with no deference to state authority, either with respect to parallel disqualification criteria or with respect to conflicting disqualification criteria. Since both disqualification and preemption were carefully considered in the same legislation no intention can be attributed to Congress other than preservation of the *Hill v. Florida* rule. Indeed the Senate Report on the LMRDA is explicit in this respect. "Section 305(a) is designed to further protect union members' and the public interest by establishing certain standards for persons holding union office — *a matter within the purview of the Federal Government*." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2366 (emphasis supplied). Although the Commission and the Division urge otherwise, nothing in the LMRDA casts any doubt upon the continued authority of the *Hill v. Florida* interpretion of section 7 of the NLRA.

We note at this point that there are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Building Trades Council v. Garmon, 359 U.S. at 244. On the other hand, where the activity in question is not specifically protected by section 7 but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. *E.g., Farmer v. Carpenters*, 430

U.S. 290, 296 (1977); *Motor Coach Employers v. Lockridge*, 403 U.S. 274, 279-98 (1971); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 59-60 (1966). The *Hill v. Florida* rule, and this case, fall in the first category. Choice of a bargaining representative is totally protected by section 7, except to the extent that the bargaining representative may be disqualified under section 503(a) of the LMRDA. No section 504 LMRDA disqualification applies to this Union's officers.[9] Thus there is neither occasion nor justification for engaging in weighing or balancing. State disqualification statutes which go beyond section 504 simply cannot operate in interstate commerce to disqualify otherwise eligible bargaining representatives.

The Commission and the Division place their chief reliance on one post-LMRDA case, *DeVeau v. Braisted*, 363 U.S. 144 (1960), which they contend overruled *Hill v. Florida*. *DeVeau* involved a challenge on preemption grounds to the constitutionality of section 8 of the New York Waterfront Commission Act of 1953, which disqualified from office in any waterfront labor organization convicted felons who had not been pardoned. The New York legislation and companion legislation in New Jersey were adopted pursuant to an interstate compact between those states. The compact was submitted to Congress, as required by article I, section 10 of the Constitution, and after hearings in both the House and Senate was approved. Nevertheless a disqualified union officer contended that the state statute was preempted by sections 1 and 7 of the NLRA. Justice Frankfurter rejected that contention, observing:

> In light of the purpose, scope and background of this New York legislation and Congress' relation to

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9. LaSane's extortion conviction would be disqualifying under 29 U.S.C. §504(a) had it occurred within five years. His 1973 conviction falls well outside the time fixed in the federal law.

> it, such an inference of incompatibility has no foundation. In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation. Here the States presented their legislative program to cope with an urgent local problem to the Congress, and the Congress unambiguously supported what is the core of this reform. Had §8 [of the New York law] been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

363 U.S. at 153. He also rejected the contention that the enactment of the LMRDA, subsequent to Congressional approval of the compact, vitiated prior approval. Frankfurter's opinion did not command a majority, but even in speaking for himself and the three justices who joined in it he was careful not to intimate that *Hill v. Florida* was overruled. The absence of any such suggestion is significant, since Frankfurter had dissented in *Hill v. Florida*. 325 U.S. at 547. Obviously he was unable in *DeVeau* to find support for the adoption of his dissenting position. Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on Congressional intent in approving the compact. 363 U.S. at 162. The dissenting justices, who noted that the justices in the majority were not overruling *Hill v. Florida*, disagreed only about the proper construction of the compact. 363 U.S. at 161, 163 (Douglas, J., dissenting). The *DeVeau* case cannot, therefore, be read as impairing the authority of *Hill v. Florida*.

The Commission and the Division also urge that *Hill v. Florida* is distinguishable because the Florida statute there involved was of a general nature, while section 93 is restricted to the casino industry, which is a matter of particular state concern. For several reasons we must reject that effort to avoid the precedential effect

of *Hill v. Florida*. In the first place sections 86 and 93 are not even restricted to casino employees. They cover casino hotel employees, who by definition do *not* work in the casinos. It is too late to suggest that places of public accommodation are not engaged in interstate commerce *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Moreover, even if the state legislation were restricted to employees employed directly in the casinos we would find the argument based on the state's deep interest in that business unpersuasive. Essentially the same argument was rejected when as a reason for avoiding federal preemption, states asserted their deep interest in the operation of state franchised public utilities. *Amalgamated Association of Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1950). Congress has given the states the option, with respect to areas in which they have a deep interest, of relegating activities in those areas to political subdivisions. 29 U.S.C. §152(2) (1976); *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971). Indeed New Jersey has exercised that option with respect to its lottery. N.J. Stat. Ann. 5:9-4 (West 1973). Congress has not, however, given the states the further option of deciding for themselves which areas of private enterprise can be so cloaked with the mantle of state interest as to be placed outside the preemptive scope of section 7 of the NLRA. The state argues that it should have that option at least for the gambling industry, because that industry is uniquely attractive to unwholesome elements in our society. Recognition of such a doctrine, however, could not be confined to the gambling industry. Other industries in which the state is vitally interested have also been identified as susceptible of infiltration by organized crime.[10] The problem of organized crime is a national one, which Congress has addressed both in criminal

10. The New Jersey solid waste industry has frequently been so identified.

statutes, *e.g.*, 18 U.S.C. §§1961-1968 (1976 & Supp. IV 1980), and by permitting general state criminal law to operate against labor union officials. 29 U.S.C. §524 (1976). That problem cannot be relied upon by the states to Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce.

We conclude, therefore, that none of the arguments advanced by the Commission and the Division can avoid the controlling law announced in *Hill v. Florida*. Section 93 of the Casino Control Act is preempted by section 7 of the NLRA insofar as it purports to confer on the Commission authority to disqualify as bargaining representatives the duly elected or selected officials of a union certified by the Board as exclusive bargaining agent. Thus the trial court's doubts about the Union's ultimate success on the merits, insofar as they were based on doubts about the preemptive effect of section 7, were groundless.

V.

Federal Regulation of Pension Funds

Following the enactment in 1959 of the LMRDA the next relevant Congressional legislation in the field of employer-employee relations was the enactment, in 1974 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001-1381 (1976). ERISA embodies a comprehensive legislative scheme which spells out in great detail the respective roles of the states and the federal government with respect to employee benefit plans. *See* 29 U.S.C. §1001 (Congressional findings and declaration of policy). Section 514(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to

> any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. §1144. The two plans of which Mr. Gerace is a trustee are employee benefit plans falling within the coverage of ERISA, and thus within section 514. Under the statute "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. §1144(c)(1). "The term 'State' includes . . . any agency . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. §1144(c)(2). We have previously discussed the legislative history of ERISA's comprehensive preemption section, finding that it "make[s] plain that the preemptive intent is just as broad as its language suggests." *Buczynski v. General Motors Corp.*, 616 F.2d 1238, 1250 (3d Cir. 1980), *aff'd sub nom Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

Despite section 514 the Commission and the Division contend that section 93(b) does not "relate to any employee benefit plan." That contention is belied by the plain language of the New Jersey statute:

> No labor organization . . . may administer any pension or welfare funds, if any officer . . . is disqualified in accordance with the criteria contained in section 86 of [the] act.

N.J. Stat. Ann. 5:12-93(b). These words cannot seriously be said not to "relate to any employee benefit plan." 29 U.S.C. §1144(a). ERISA states that statutes relating to employee benefit plans are preempted even when their effect is indirect. 29 U.S.C. §1144(c)(2). These preemption subsections have been definitively construed by the Supreme Court. "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v.*

Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981). In light of that construction the contention that section 93 and ERISA may lawfully coexist is fanciful.

VI

Propriety of Injunctive Relief

Since in Parts IV and V of this opinion we conclude that the Union's claims that section 93 is preempted by section 7 of the NLRA and section 514 of ERISA are meritorious, we turn to the question whether the requested preliminary injunctive relief against the proceeding pending before the Commission should have been granted. Federal law standards for such relief are clear. They include the likelihood of the moving party succeeding on the merits at final hearing, the likelihood of irreparable harm to the moving party *pendente lite* if no relief is granted, the possibility of harm to other interested parties from the grant of such relief, and the public interest. *E.g., Constructors Association v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978); *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975).

Our discussion in Parts IV and V is dispositive of the first factor. Since section 93 cannot coexist with section 7 of the NLRA and section 514 of ERISA, the district court should have recognized that sooner or later the Union's objection to the Division's efforts to deprive it of dues revenues and make it ineligible to maintain pension and welfare funds must prevail.

Moreover the application of the second factor, irreparable harm *pendente lite*, seems plain. Irreparable harm *pendente lite* includes at least that kind of harm which cannot be rectified after final hearing by an award of money damages. Clearly that was threatened when the Division moved before the Commission for an order disqualifying the Union from collecting dues from its 8000 plus members employed by casino hotels. Had the order gone into effect, the Union would either have been

deprived of the financial wherewithall to carry on its collective bargaining responsibilities or have deposed those duly elected officers whom the membership selected as their collective bargaining representatives. In neither case would it be possible, long after the event, to measure in money and compensate for the harm to the ongoing collective bargaining relationship from intangibles such as erosion of members' confidence in their chosen collective bargaining organization, delay in the process of grievances, or disruption of internal union affairs. The Division, while pressing forward with its effort to obtain disqualification, makes the disingenuous argument that "[a]t the conclusion of the hearing, the Commission could find the Union totally qualified, in which case the present proceeding might arguably become moot." Brief for Appellees/Cross Appellants (Division) at 48. In fact, however, in the absence of a preliminary injunction the Division pressed forward, diverting the Union's efforts to the defense of that illegal proceeding rather than the performance of its normal functions as the certified bargaining representative of its members.

Nor can the Division or the Commission point to any irreparable harm to them or to the casino industry from an injunction pending a judicial resolution of the contention that section 93 cannot be applied to the Union. Both point to the necessity for maintaining integrity in the casino industry, but there are ample means available to that end short of disqualifying duly certified bargaining representatives. No showing was made in the district court that the potential infiltration of the casino industry by criminal elements operating through the Union would become an actuality before final hearing.

Finally there is the matter of the public interest. Obviously the first place to look for that interest is the governing law, which in this case is federal. The extent of the national public interest in preventing state agencies from purporting to exercise a jurisdiction which is the

exclusive preserve of the Board may be judged by cases recognizing that the Board can obtain injunctive relief against the exercise of such jurisdiction by state courts both before and after the General Counsel has filed a Board charge. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954).[11] Moreover even if a state court were to attempt to enforce an order in a preempted labor area the national public interest in preserving federal preemption is so strong that the order could be disobeyed without fear of being held in contempt. *In re Greene*, 369 U.S. 689 (1962).

Against the clear national public interest in preventing erosion of the exclusive role of section 7 in determining collective bargaining representatives the Commission and the Division is arrayed the artillery of *Younger v. Harris*, 401 U.S. 37 (1971), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The district court was unpersuaded by these big guns, and so are we.

Pullman abstention would at most have required that the district court retain jurisdiction while a narrowing construction of section 93 which might avoid the constitutional adjudication was sought from a New Jersey tribunal. Before the complaint was filed the Commission had already ruled that it could not consider the Union's preemption claim. Moreover the defendants never suggested any construction of section 93 which could avoid deciding the preemption issue. The Union was certified by the Board with the present officers. Section 93 says that it may be disqualified if the Commission decides some of them fall within the criteria in section 86. *Pullman* abstention would be an exercise in

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11. *Cf.* Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955) (28 U.S.C. §2283 prevents injunction against state court proceeding in action by Union rather than Board).

futility. Moreover, even if the district court had decided to abstain pending the Commission's interpretation of section 93 it would still have been obliged to consider the grant of preliminary injunctive relief from harm *pendente lite*. *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, 654 F.2d 868, 886 (3d Cir. 1981).

Burford v. Sun Oil Co. has no application. As the district court noted, the questions of state law presented by sections 93 and 86 are neither technical nor complex. 536 F.Supp. at 325. Moreover no argument can be entertained based on disruption of a state administrative scheme in a case in which the court is asked to decide whether the very existence of that scheme violates a paramount federal statute. *A fortiori* that is so when, as here, the state agency lacks authority even to entertain the preemption challenge.

As to the *Younger v. Harris* line of cases, we reiterate the point made in *New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education*, that, absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1976), escape any federal appellate review for long periods. 654 F.2d at 884. Moreover, the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter. *In re Greene*, 369 U.S. 689 (1962). *See also Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 386, 399 (1951). Even pending state proceedings may be enjoined on preemption grounds. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954). These authorities suggest that when the issue tendered to a federal district court is the very

power, as a matter of federal law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger v. Harris* rule are totally inapplicable. Certainly we cannot hold that the district court committed an abuse of discretion in holding a hearing on the Union's motion for a preliminary injunction.

Given that the Union's contentions based on section 7 of the NLRB and section 514 of the LMRDA are meritorious, that there was a strong likelihood of harm *pendente lite* to its status as a collective bargaining representative, that no commensurate harm to the defendants would have resulted from the grant of *pendente lite* relief, and that a strong national public interest exists in preventing the unlawful exercise of state agency jurisdiction in a preempted area, we hold that the trial court should have granted a preliminary injunction pending final hearing against the enforcement of section 93(b) in any manner inconsistent with 29 U.S.C. §504.

VII

Overbreadth and Vagueness

Because the statutory supremacy issues which we have discussed in Parts III and IV suffice to dispose of this appeal, we have no occasion to pass upon the Union's overbreadth and vagueness contentions. *Hagans v. Lavine*, 415 U.S. 528 (1974).

VIII

Conclusion

The order appealed from in No. 82-5210 will be reversed and the case remanded to the district court for the entry of an order enjoining the Commission and the Division from taking any action, pending final hearing, to enforce section 93 against the Union. The cross appeals, Nos. 82-5234 and 82-5260, will be dismissed for lack of jurisdiction.

BECKER, J., concurring in part and dissenting in part.

I concur in that part of the majority's opinion which holds that ERISA precludes the Casino Control Commission from regulating the management of pension and welfare funds.[1] And, though I do not agree with the

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1. By reaching the merits of this appeal, the majority assumes that we are presented with a live controversy. I have evinced my agreement with that conclusion by joining the majority's holding that ERISA preempts some of the Casino Control Act's sanctions. I nonetheless find the question sufficiently troublesome that it warrants some discussion.

This is an appeal from a district court order denying appellants' motion for a preliminary injunction. Unlike the complaint, however, the focus of that motion was the holding of hearings that have now taken place: the motion principally alleged that the "*proceedings* [i.e., the Casino Control Commission's hearings and investigations] present an immediate and irreparable injury" to appellants' section 7 rights. Motion for Preliminary Injunction ¶5 (emphasis added). The district court denied the motion on the basis that appellants could not demonstrate that the *proceedings* would result in the requisite irreparable harm: "The inquiry into the qualifications of the union and its leaders may not be considered to visit irreparable harm on the plaintiffs; something further must befall them before preemption may be found." Hotel and Restaurant Employees and Bartenders Int'l Union Local 54 v. Danzinger [sic], 536 F. Supp. 317, 330 (D.N.J. 1982). As the supplemental record now reveals, and as the majority now acknowledges, the proceedings that the district court refused to enjoin have been completed. It thus might appear that this appeal should be dismissed as moot.

Such a disposition, however, would be severe, as all that stands between appellants and enforcement of the Commission's order that Local 54 rid itself of certain officers or be barred from collecting dues from its members is the district court's stay of that order pending the disposition of this appeal. Although I do not think that this unfortunate circumstance is itself sufficient to resurrect what otherwise would be a moot appeal, I do believe that the same considerations which persuaded the district court to grant the stay also suggest that this case is one of a rare breed in which it is appropriate for us to reach the merits, notwithstanding the interlocutory posture of the appeal. As Judge Friendly wrote for the Court of Appeals for the Second Circuit in a similar context:

[A]n appellate court has the power, on review of a denial of a

majority's conclusion that we lack jurisdiction over the cross-appeals,[2] I nevertheless share the majority's view

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temporary injunction, to consider the case on the merits and decide whether the complaint states a claim on which relief can be granted. . . . Although in most of the cases where this course has been followed the appellate court has ordered the complaint to be dismissed, such a procedure is also appropriate in the converse situation at least where, as here, no material facts are contested, the lower court has considered the merits in detail and these have also been argued here. . . . To "save the parties from further litigation" we should therefore "proceed to consider and decide the case upon its merits," [Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 494 (1900)], unless a ruling on the entire complaint, with its requests for declaratory and permanent injunctive . . . relief, has also become moot.

Montano v. Lefkowitz, 575 F.2d 378, 382 (2d Cir. 1978) (citations omitted). This case, too, is amenable to such treatment, despite the fact that the district court did not reach the viability of the Casino Control Act's ultimate sanctions. There are no disputed issues of material fact; the parties have extensively and comprehensively briefed and argued the merits both before the district court and this Court; and the preemption issue, essentially a question of law, is one as to which we ultimately would have plenary review. Because appellants' requests for permanent injunctive and declaratory relief are still very much alive, I therefore agree with the majority's decision to reach the merits of this appeal.

2. Despite its acknowledgment that Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) (in banc), recognizes a limited class of pendent appeals under 28 U.S.C. §1292(a)(1) (1976), the majority posits three reasons why we do not have jurisdiction over the cross-appeals. None of these considerations, however, poses an insurmountable obstacle to our taking jurisdiction.

First, the majority offers no support for its assertion that the Casino Control Commission and the Division of Gaming Enforcement may not raise their cross-appeals here because they were not aggrieved by the denial of the preliminary injunction. Moreover, that proposition is inconsistent with the fact that courts of appeals reviewing denials of preliminary relief frequently dismiss cases for failure to state a cause of action, thereby acting as if they had granted a cross-motion to dismiss. *See* Montano v. Lefkowitz, 575 F.2d 378, 382 (2d Cir. 1978) (quoted *supra* note 1).

that the district court was correct in declining to abstain.[3]

I cannot subscribe, however, either to the sweeping preemptive scope that the majority ascribes to the NLRA

NOTE — *(Continued)*

Second, the majority is too willing to dismiss the cross-appeals on the ground that the district court (apparently inadvertently) neglected to enter an order denying the motions to dismiss or abstain. The majority states: "The trial court's opinion discussed these motions, but appeals do not *ordinarily* lie from opinions." Majority op., typescript at 16 (emphasis added). But this formulation, by its own terms, admits of an exception, and it is one that we previously have recognized. Where, as here, a district court opinion necessarily and definitively resolves a question as a predicate for its holding, the district court's resolution is reviewable on appeal. *See* United States ex rel. Fielding v. Degnan, 587 F.2d 619, 621 (3d Cir. 1978). Here the district court could not have reached the merits of appellants' motion for preliminary relief without first having denied appellees' motion to abstain.

Finally, the majority incorrectly asserts that a crossappeal from a denial of a motion to abstain does not satisfy Kershner v. Mazurkiewicz's test for pendent interlocutory cross-appeals. *Kershner*, which did not permit the cross-appeal of a class certification order, stated that the issue on cross-appeal must be "inextricably bound" with or controlling of the disposition of the preliminary injunction issue. 670 F.2d at 449. Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstention is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief.

3. Although the Supreme Court initially promulgated the *Younger* abstention doctrine in order to prevent federal courts from interfering with ongoing state criminal proceedings, *see* Younger v. Harris, 401 U.S. 37 (1971), the Court has since broadened the doctrine's scope. Federal courts now are admonished to refrain from taking action, absent extraordinary circumstances, when a plaintiff requests relief that would impinge on state proceedings of virtually any variety. "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 102 S. Ct. 2515, 2521 (1982) (holding that federal court should have abstained from interfering with ongoing state-bar disciplinary proceedings).

and the LMRDA or to the holding that section 7 of the NLRA precludes New Jersey from restr cting who may hold office in unions representing employees in the casino industry. Relying primarily on *Hill v. Florida ex rel.*

Thus, at first blush, this case appears to fall within the class of cases in which district courts should abstain from adjudicating the claims at issue. Proceedings to enforce the Act's prohibitions are essential to vindicating the state's policies, *see infra* Part III; New Jersey's interest surely is as strong as, if not stronger than, those that have been deemed sufficient in other cases. *Cf.* Trainor v. Hernandez, 431 U.S. 434 (1977) (barring interference with state proceeding to recover welfare money); Juidice v. Vail, 430 U.S. 327 (1977) (barring injunction against state civil contempt proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (barring injunction against civil enforcement action to close down theater showing obscene movies); Williams v. Red Bank Bd. of Educ., 662 F.2d 1008 (3d Cir. 1981) (barring interference with tenure- revocation proceeding).

This conclusion is not altered by the fact that the proceedings, unlike those in *Middlesex County*, are not conducted under the auspices of the judiciary. In Williams v. Red Bank Bd. of Educ., *supra*, this Court addressed the question whether the federal courts should entertain a challenge to ongoing tenure-revocation proceedings. Noting that "[a]dministrative regulation often forms a crucial aspect of a state's implementation of its laws . . .," we held that "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, the district court, pursuant to *Younger*, should abstain." 662 F.2d at 1016, 1017.

While the administrative nature of the Casino Control Act's proceedings therefore do not themselves remove this case from the ambit of *Younger* abstention, I do not believe that the proceedings afford an adequate opportunity for the vindication of appellants' federal claims. *See Middlesex County, supra*, 102 S. Ct. at 2521. To be sure, as in *Red Bank*, any decision of the Casino Control Commission is appealable to the state courts, and *Younger's* premise is that state courts are as competent as are federal courts to adjudicate federal claims. Here, however, appellants attack not merely the sanctions for which the Casino Act provides; appellants also assert that their federally created rights are violated by appellants' being subjected to the administrative proceedings themselves. Thus, regard-

Watson, 325 U.S. 538 (1945), and Congress' subsequent failure to overrule *Hill*, the majority fashions a preemption doctrine that appears to leave no room for state regulation that affects section 7 rights. As I read the relevant case law, however, preemption doctrine is far from absolute, and the strength and importance of New Jersey's interest in enacting a comprehensive regulatory scheme is critical to a determination whether the provisions challenged here constitute an impermissible intrusion on federally created and protected rights. After considering two post-Hill manifestations of congressional intent strongly suggesting that state regulation is not necessarily inconsistent with national labor policy, the colossal problems associated with casino gambling, and New Jersey's interest in attempting to prevent the incidence of such problems and the poisoning of its polity, I conclude that federal labor law does not preempt the Ca-

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NOTE — *(Continued)*
less of the competence of the state judiciary, all of appellants' federal claims simply cannot be vindicated in state court.

In such circumstances, abstention is inappropriate because it would deprive a putative plaintiff of the opportunity to vindicate his federal claims. I therefore would hold that, where an individual who is subject to state proceedings to which the federal courts otherwise would defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. *Cf.* Abney v. United States, 431 U.S. 651 (1977) (denial of claim of double jeopardy is an appealable collateral order); United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034, 1037 (3d Cir. 1975) (pre-trial habeas relief available where alleged nature of constitutional right asserted, i.e., not to be tried twice, makes post-conviction relief incapable of vindicating the right); Jackson v. Justices, 549 F.2d 215, 220 n.1 (1st Cir.) (Coffin, C.J., dissenting) ("Whether or not there is to be a general 'futility' exception to the *Younger* doctrine, an exception seems appropriate in the case of double jeopardy claimants who are to be denied the opportunity in the state court system to demonstrate that they have a right not to be retried."), *cert. denied*, 430 U.S. 975 (1977).

sino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials. Accordingly, I dissent from so much of the majority's opinion and judgment that reaches the contrary conclusion.

I. *Labor Preemption — The Generally Applicable Principles*

Appellants' preemption argument is relatively straighforward: section 7 of the NLRA, 29 U.S.C. §157 (1976), guarantees employees the right "to bargain collectively through representatives of their own choosing." Section 93 of the Casino Control Act, however, precludes casino employees from selecting as their bargaining representatives individuals who do not meet the Act's qualification criteria. If employees ignore the statute's admonition, the Casino Control Commission may prevent their union from collecting dues from its members, thus vitiating the union's ability to function. Appellants argue that this restriction impermissibly intrudes on their unqualified section 7 right to select their collective bargaining representatives. Indeed appellants go so far as to say that section 93's operation would "totally disrupt and prevent the application to [the casino] industry of federal policies as expressed by the [NLRA]." Br. for Appellants at 13.

The majority's reaction to this contention is aptly characterized by the following passage:

> [T]here are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute. 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the [NLRA], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the states free to regulate conduct so plainly within the central aim of federal reg-

> ulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.' . . . On the other hand where the activity in question is not specifically protected by section 7, but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. The *Hill v. Florida* rule, and this case, fall in the first category.

Majority op., typescript at 36-37 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)). Although this formulation supports the majority's judgment, it does so only by drawing an inaccurate distinction and by oversimplifying preemption analysis.

There *are* certain areas in which congressional action precludes the states from regulating at all. But Congress generally does not identify these areas by creating amorphous categories of "protected activity." Rather, the areas in which Congress has usurped the field are generally defined by explicit statutory language (and, in certain rare situations, legislative history). One example of which the majority itself takes note is ERISA, which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. §1144 (1976); *see* Majority op., typescript at 42-44. Similar examples may be found in various individual provisions of the NLRA and the LMRDA. *E.g.*, 29 U.S.C. §§164(a), 483 (1976) (discussed *infra* at pp. 13 n.5, 22).

Most federal statutes, however, do not wear their preemptive nature on their sleeves; many provisions of

federal labor law, including section 7 of the NLRA, fall into this latter category. *See New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 540 (1979) (plurality op.). Obviously, it would be a mistake to infer from such statutory silence that any and all state regulation is permissible. But it also would be a mistake hastily or uncritically to characterize the particular conduct governed by such federal statutes as "plainly within the central aim of federal regulation" and therefore beyond the reach of the states. As Justice Frankfurter wrote in *De Veau v. Braisted*, 363 U.S. 144, 153 (1960) (plurality op.): "It would misconceive the constitutional doctrine of preemption . . . to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance."

Our task, therefore, is more complex than the majority suggests: in order for us properly to determine the implicit preemptive scope of a federal statute, we must examine thoroughly the purposes and policies of the federal scheme and the extent to which state regulation would be incompatible.

> The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

Id. at 152.

The Supreme Court recently has restated the direction that our inquiry must take in this context:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. . . . [I]f the conduct at issue is arguably prohibited or protected otherwise applicable

> state law and procedures are ordinarily preempted. . . . When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. . . . The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

Local 926, International Union of Operating Engineers v. Jones, 103 S. Ct. 1453, 1458-59 (1983)[4] (citations omitted) (holding state-court action preempted when conduct at issue arguably constituted unfair labor practice, even though NLRB declined to issue complaint). Proceeding within *Local 926's* framework, I therefore turn first to the question whether Congress intended section 7 to preempt all attempts by states to impose criteria on whom employees may select as their bargaining representatives. Having determined that all such regulation does not run afoul of congressional intent, I then explain why New Jersey's interest in prohibiting certain individuals from representing employees in the casino industry is so "deeply rooted in local feeling and responsibility" that it justifies any resulting intrusion on section 7 rights.

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4. Thus the majority is incorrect to the extent that it admonishes against "engaging in weighing or balancing." Majority op., typescript at 37.

Appendix A

II. *Congressional Preemptive Intent*

Like the majority, I look to that most elusive of guides — congressional intent — to determine whether state-imposed restrictions like those of the Casino Control Act are compatible with federal labor policy. Unlike the majority, however, I conclude from two manifestations of that intent — the enactment of the LMRDA and congressional acquiescence in the state-imposed restrictions upheld in *De Veau v. Braisted* — that national labor policy permits state-imposed restrictions in certain circumstances. Before turning to those factors, however, I first explain why *Hill v. Florida's* explication of congressional intent is not dispositive here.

A. *Hill v. Florida*

I agree with the majority that the starting point for our analysis must be *Hill v. Florida, supra,* for *Hill* represents the seminal explication of section 7's preemptive scope.[5] I disagree, however, with the majority's con-

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5. Ordinarily, of course, the language and legislative history of the statute itself provide the starting point for inquiries into congressional intent. In this case, however, contrary to the intimations of the majority, neither the NLRA nor the Taft-Hartley Act is of much assistance in that regard.

1. *The National Labor Relations Act of 1935 (The Wagner Act).*

In the course of congressional debate over the Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), the only real mention of the relationship between federal and state regulation of the selection of bargaining representatives was an objection that the Act's regulation of local employment would violate the tenth amendment. *See* Letter from Counsel for Appellant to the Court (Dec. 3, 1982) (submitted at the request of the Court) (citing *Hearings on S. 1958* at 243-44, 840 (Mar. 11-14, 1935) (statement of James A. Emery)). The ultimate rejection of that position, however, in no way implies that Congress intended to preempt the field. Indeed as the majority eloquently demonstrates, subsequent case law implies the contrary. The majority, however, infers a preemptive intent from the fact that

clusion that the *Hill* Court's reading of congressional intent remains either definitive or controlling.

At issue in *Hill* were two provisions of a Florida statute governing all labor unions operating within the state. Section 4 of the law required that anyone serving as the "business agent" of a union be licensed by a three-man board composed of the Governor, the Secretary of State, and the Superintendent of Education. The section also provided that licenses would be issued only to individuals who had been citizens of the United States for at least ten years, had not been convicted of a felony, and were of "good moral character."

NOTE — *(Continued)*

Congress did not impose eligibility requirements for service as collective bargaining representatives despite having had drawn to its attention related problems of labor racketeering. Though the omission no doubt represented, as the majority asserts, "a conscious legislative choice," it would be equally plausible to infer that Congress preferred any such restrictions to be imposed by the states. Thus the omission of restrictions provides little insight into congressional intent.

2. *Labor Management Relations Act of 1947 (Taft-Hartley)*

Resort to the legislative history of the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), is equally unilluminating. These debates, too, contain no discussion of the extent to which Congress wished to preclude imposition by the states of qualifications for union representatives. *See* Garner v. Teamsters, Chauffers, and Helpers Local Union No. 776, 346 U.S. 485, 488 (1953) ("The [LMRA] . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."). Indeed only a few of Taft-Hartley's provisions refer to state action, and those provisions can support conflicting inferences. Two provisions arguably support an inference that Congress intended to preempt unless it stated otherwise. First, Congress amended §10(a), 29 U.S.C. §160(a) (1976), to eliminate the NLRB's exclusive jurisdiction, and instead to allow the NLRB, with certain restrictions, to cede jurisdiction to state agencies. Second, §14(b), *id.* §164(b), explicitly permits the states to prohibit union security clauses. The House Committee explained

The second contested provision, section 6, required every labor union operating within the state to file with the Secretary of State annual written reports containing the name of the union, the location of its offices, and the names and addresses of all union officers. The filing of these reports was a prerequisite to a union's obtaining a license to function within the state; failure to comply with either section 4 or section 6 was punishable as a misdemeanor.

Hill, a business agent within the meaning of the Florida law, and his union, Local No. 234 of the United Association of Journeymen Plumbers and Steamfitters,

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that "[i]t was never the intention of the [NLRA], as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." H.R. Rep. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135, 1166.

But if §§10(a) and 14(b) might be read to imply that state action is precluded unless specifically permitted, §14(a), 29 U.S.C. §164(a) (1976), leaves the contrary impression. That section states:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The fact that Congress felt the need explicitly to preclude states from defining supervisors as employees for purposes of collective bargaining might be read to suggest that the states do retain some freedom to enact other proscriptions not mentioned by the NLRA. The question whether §14(a) should be so interpreted is not presented here, and I do not necessarily advocate such a reading. I posit the argument only to underscore that we should be wary of inferring preemptive intent from provisions that do not expressly license the states to act.

In short, despite the fact that the Taft-Hartley Congress was clearly attuned to the problems associated with dual systems of regulation, there was no discussion of the preemptive effect of §7. The legislative history of Taft-Hartley is thus of little more help than is that of the Wagner Act.

failed to register with the state and to obtain the licenses required by sections 4 and 6. Alleging violations of the Act, the Florida Attorney General successfully sued in state court for injunctions against Hill's further functioning as the union's business agent and the union's further functioning at all until each complied with the statutory requirements.

The Florida Supreme Court upheld the injunctions; the United States Supreme Court reversed, finding both injunctions inconsistent with the NLRA. With regard to section 4, the Court stated:

> Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he could . . . be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that §4 of the Florida Act is repugnant to the National Labor Relations Act.

325 U.S. at 542. The Court reached a similar conclusion regarding section 6. *Id.* at 543.

Relying on this holding, the majority reads *Hill* as standing for the proposition that section 7 precludes the states from fixing standards or qualifications for labor unions, their officers, or their agents if such standards or qualifications would preclude the unions or their representatives from being chosen and functioning as bargaining agents under section 7 of the NLRA. The majority therefore concludes that section 93 of the Casino Control Act is preempted.

Although section 93 of the Casino Control Act does attempt to define qualifications for union officials in the casino industry, I disagree with the majority's conclusion that *Hill* therefore requires us to invalidate it. The central distinction between *Hill* and this case concerns the challenged laws themselves. The Florida statute at issue in *Hill* did nothing but establish qualification criteria for the officials of *all* labor unions in the state. Apparently the state's sole purpose was the regulation of labor unions. Section 93 of the Casino Control Act, by contrast, does not seek to regulate all unions, but only those with members working in the casino industry. Moreover, section 93 is part of a larger regulatory scheme whose purpose is by no means labor-oriented. Thus *Hill's* rejection of Florida's attempt to establish qualifications for all union officials does not lead inexorably to the conclusion that the legislation here at issue also is inconsistent with congressional intent.[6]

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6. There is another reason that *Hill* does not control all aspects of this case. The *Hill* Court made relatively clear with respect to section 4, and explicitly so with respect to section 6, that it was the statutes' sanctions that conflicted with congressional purpose. In particular, the Court noted in discussing section 6:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But, for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. *It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.*

325 U.S. at 543 (emphasis added). Thus even if *Hill* were controlling here, this formulation suggests only that a state may not prevent a union collecting dues from its members. But this case involves more than just the Casino Control Commission's ultimate sanction power. Also at issue are the Casino Act's provisions for registration and licensing of unions representing casino employees, for

The majority seeks to buttress its construction of congressional intent by focusing on Congress' having twice enacted major labor legislation without overruling *Hill*. In particular, the majority asserts that Taft-Hartley's "reenactment of the original section 7 . . . must be considered to be a Congressional approval of the holding in *Hill* that state law on eligibility is preempted." Majority op., typescript at 30. The majority reaches a similar conclusion regarding the effect of the LMRDA:

> [I]n 1959 Congress, fully aware of the holding in *Hill v. Florida* that section 7 preempted state disqualification laws, of the rule of statutory interpretation . . . that Congressional deference to state law must be specific, and of the holdings . . . that even state regulation of activity prohibited by federal law is preempted, chose to legislate on the subject of union officer disqualification with no deference to state authority, either with respect to parallel disqualification criteria or with respect to conflicting disqualification criteria. Since both disqualification and preemption were carefully considered in the

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NOTE 6 — *(Continued)*
investigations by the Division of Gaming Enforcement, and for hearings by the Commission. By failing to distinguish these various elements of the Casino Act's scheme from the sanctions, the majority intimates that *Hill* would preclude them as well. Indeed the majority characterizes the hearings as an "illegal proceeding," Majority op., typescript at 46, without any discussion to that effect. But given the Supreme Court's holding that it was the "sanction [t]here imposed, and not the duty to report," that conflicted with the NLRA, *Hill* simply cannot be construed as affecting the validity of the non-sanction provisions; to the extent that the majority holds the contrary, I dissent from that part of the holding as well. *See also* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 466 (1945) ("Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the [NLRA]. . . .").

> same legislation no intention can be attributed to Congress other than preservation of the *Hill v. Florida* rule.

Majority op., typescript at 35.

Although appealing, this dwelling on non-events relies too heavily on the Supreme Court's approach in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). In *Curran*, the Supreme Court, addressing Congress' failure to eliminate judicially created private causes of action, stated:

> [T]he fact that a comprehensive reexamination and significant amendment of the [Commodities Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.

Id. at 381-82 (footnote omitted). But the Supreme Court's approach in *Curran* cannot be taken too far; nor can it automatically be transferred to other contexts. First, as *Curran* itself noted, congressional inaction is only evidence of congressional acquiescence; neither in *Curran* nor elsewhere has the Supreme Court said that such inaction resolves the question of congressional intent. Indeed *Curran* itself went on to review the particulars of the legislative history in order to confirm the Court's belief that Congress intended to preserve the private remedy. *See id.* at 382-88.

More importantly, *Curran's* formulation was adopted in a simpler context: Congress either did or did not intend to create a private right of action. By contrast, the question whether Congress intended to preempt state regulation of labor unions cannot so easily be answered in one case for all future cases. Rather, the answer will depend on the type and extent of regulation, the industry involved, the need for such regulation — in short, on the circumstances of each case, *see Local 926 v. Jones, supra*, 103 S. Ct. at 1458-59. Thus woodenly to transfer

the *Curran* approach to the more fluid context of labor-law preemption at once overestimates the comprehensiveness of congressional decisionmaking and underestimates the complexity of preemption doctrine.

In fact, it would be manifestly unrealistic to expect Congress to have contemplated, addressed, and resolved all (or even most) of the potential state/federal conflicts arising from overlapping regulatory schemes. As Professor Summers has pointed out in discussing the preemptive effect of the LMRDA:

> Congress did not, and could not, work out in detail the coordination of federal and state law. To do so would require at the very least a comprehensive knowledge of existing state law and the kinds of cases which came before the courts. Furthermore, it would require a clear understanding by Congress of what it was prescribing as federal law. Congress lacked both of these since such precision of knowledge and understanding is not possible.

Summers, *Pre-emption and the Labor Reform Act—Dual Rights and Remedies*, 22 Ohio State L.J. 119, 152 (1961); *cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (noting the "inevitable incompleteness presented by all legislation"). I do not suggest that Congress was unaware of *Hill* or of extant preemption jurisprudence. Nor do I suggest that we can or should ignore Congress' failure to disavow *Hill*. But I cannot agree with the majority that we *must* read that failure as a congressional stamp of approval.

In short, I do not view either *Hill's* explication of congressional purpose or Congress' failure to reject *Hill's* holding as dispositive evidence of congressional intent to preempt all state legislation regulating union officials. Moreover, the majority's attempt to parlay the 1945 *Hill* decision into a current and continuing expression of congressional intent is belied by more recent manifestations of congressional intent that suggest the contrary. I turn now to these.

Appendix A

B. *The LMRDA*

As the majority correctly points out, the NLRA, as originally enacted, placed no restrictions on employees' choice of representatives. "Their own best judgment, not that of someone else, was to be their guide." *Hill v. Florida, supra*, 325 U.S. at 541. In 1959, however, Congress enacted the LMRDA, Pub. L. No. 86-257, 73 Stat. 519 (1959), explicitly recognizing the danger of criminal infiltration of the labor movement. *See* H.R. Rep. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2431. In particular, section 504(a) provides that individuals convicted of various felonies are prohibited from holding union office for five years.[7] 29 U.S.C. §504(a) (1976). Thus, whether or not restrictions on who may hold union office would be inconsistent with the unqualified free choice that the majority would read into the original section 7, Congress itself has established that the choice is no longer unfettered and that national labor policy admits of some such limitations.

The majority holds, however, that although the LMRDA promulgates federal criteria for the holding of union office, it does not permit the states to impose the additional and more stringent criteria at issue here. To support its position, the majority points out that two provisions of the LMRDA, sections 603(a) and 604, contain "savings clauses" that explicitly recognize the right of the states to provide remedies beyond those provided by the statute; Congress did not append such a clause to section 504, however, and the majority therefore infers a congressional intent to preclude the states from imposing more stringent disqualification criteria.

That conclusion is incorrect for several reasons. First, the majority fails to mention that at least one other

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7. The full text of §504 is set forth at note 8 of the majority's opinion.

section of the LMRDA *is* expressly preemptive: section 483 states that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive." 29 U.S.C. §483 (1976). Thus it is possible to draw an inference, at least as strong as the majority's, that Congress intended to preempt only when it did so explicitly.

A more realistic approach is that the LMRDA's erratic allocation of enforcement jurisdiction between the state and federal governments makes futile any attempt to divine congressional intent from the absence of a savings clause in section 504. As the minority report accompanying the Senate version of the LMRDA protested:

> The . . . bill distributes its remedies . . . in accordance with no discernible standard or consistent principle. Some remedies are exclusively Federal, some are left to the States and denied to the Federal Government, some are given to the States but only if they apply Federal law, and some are allocated to both the States and Federal Government. In some instances, the majority insisted upon exclusive Federal jurisdiction asserting that absolute uniformity was essential; in others, it was insisted that diversity of treatment under varying State laws was absolutely necessary.

S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2407; *see also* Summers, *supra*, 22 Ohio St. L.J. at 122 ("Congressional fear of destroying valuable state remedies without providing adequate federal substitutes, and the spectre of creating a new 'no man's land,' routed all objections toward overlapping and possibly conflicting remedies. The statute became studded with assorted provisions cut from different patterns.").

More important, the majority incorrectly asserts that neither of the savings clauses subsumes the subject matter of section 504. Section 603(a) declares:

Appendix A

> Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

29 U.S.C. §523(a) (1976).[8] The majority contends that the only state-law remedies that this provision preserves are those for breach of fiduciary duties by union officials. *See* Majority op., typescript at 33, 34. Not only is there no

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8. The other savings clause is contained in §604, which explicitly preserves the ability of the states to enact "garden variety criminal laws," *see* Majority op., typescript at 34, notwithstanding the LMRDA's "federalization" of conduct that might otherwise come within the scope of state criminal law.

> Nothing in this chapter shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

29 U.S.C. §524 (1976). This provision, the majority notes, was enacted in response to dicta in Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 (1953), and San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), that states might be precluded from regulating conduct proscribed by federal law. Although this savings clause does not authorize the type of restriction here at issue, I do not agree, for the reasons stated in text, that Congress' decision to include the clause in the LMRDA suggests that other sections without similar clauses must be read as preemptive.

support in the legislative history for such a narrow construction, *see* Summers, *supra*, 22 Ohio State L.J. at 122, 140, but the Supreme Court expressly rejected it in *De Veau v. Braisted, supra*: "§603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such preemption is expressly provided. . . ." 363 U.S. at 157.[9] Although the language was that of a four-Justice plurality, Justice Brennan, who provided the fifth vote, explained in a concurrence that the LMRDA "explicitly provides that it shall not displace such legislation of the States."[10] *Id.* at 160-61; *see also Local 1804, International Longshoremen's Ass'n v. Waterfront Commission*, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (1981) (relying in part on section 603(a)'s savings clause in concluding that section 504 of the LMRDA does not preempt section 8 of the New Jersey Waterfront Commission Act).

Finally, it is important to note that one of the factors that motivated Congress to enact the LMRDA was the inability of the states to deal effectively with criminal infiltration of unions. "The LMRDA was adopted in large part because state and local authorities had failed to adopt 'effective measures to stamp out crime and corruption [in unions] and guarantee internal union democracy. . . .' Consistent with this legislative purpose, Congress could reasonably allow a state to adopt more restrictive eligibility requirements. . . ." *International Longshoremen's Association v. Waterfront Commission*,

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9. For the facts of *De Veau*, *see infra* Part II.C.

10. I note in passing that appellants here contend that only the NLRA and ERISA preempt the sanctions provided by the Casino Control Act. They have apparently abandoned the argument they advanced to the district court that the LMRDA also has such a preemptive effect. The district court rejected that argument, noting that the contention was "easily disposed of by reference to *DeVeau*." Hotel and Restaurant Employees v. Danziger, *supra*, 536 F. Supp. at 327; *see id.* at 326-28.

495 F. Supp. 1101, 1123 (S.D.N.Y. 1980), *affirmed in part and reversed in part on other grounds*, 642 F.2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981). In short, it is simply too late to assert that the LMRDA supersedes section 93 of the Casino Control Act; the more reasonable interpretation is that Congress viewed such legislation as complementing the federal scheme.

C. De Veau v. Braisted:

Congressional Acquiescence in State Imposed Restrictions

In addition to establishing the non-preemptive effect of the LMRDA, *De Veau* sheds considerable light on the preemptive scope of the NLRA. De Veau was an officer of the Longshoremen's Union against whom New York invoked section 8 of its Waterfront Commission Act of 1953, a provision quite similar to the one at issue here. Section 8 provided that no one could collect dues on behalf of a waterfront union if any officer or agent of the union had been convicted of a felony and either had not been pardoned by the governor or had not received a good conduct certificate from the parole board.[11] De Veau contended that the law impermissibly restricted the rights guaranteed by sections 1 and 7 of the NLRA.

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11. Unlike §504 of the LMRDA, which bars convicted felons from holding union office for five years, §8 of the New York Waterfront Commission Act imposes a bar that may be permanent:

> No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within the state for or on behalf of any labor organization which represents employees registered or licensed pursuant to the provisions of this act . . . if any officer, agent or employee of such labor organization . . . has been convicted by a court of the United States, or any state or territory thereof, of a felony [or] any misdemeanor involving moral turpitude . . . unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such

Appendix A

The Supreme Court upheld the New York statute. Section 8, the Court explained in a plurality opinion by Justice Frankfurter, was enacted in conjunction with and in furtherance of an interstate compact between the states of New York and New Jersey. The compact, which established the bi-state Waterfront Commission of New York Harbor, had been approved by Congress pursuant to Article I, section 10 of the United States Constitution. Waterfront Commission Compact, Pub. L. No. 83-252, 67 Stat. 541 (1953). It therefore could not be maintained that section 8 was inconsistent with congressional intent.[12]

Appellants contend that the absence of a similar compact in this case renders *De Veau* inapposite here. This argument, however, ignores three critical aspects of *De Veau*. First, four Justices explicitly rejected an in-

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Note 11 — *(Continued)*

conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

N.Y. Unconsol. Laws §9933 (McKinney 1974). In fact, New York was seeking to bar De Veau from holding union office because of a 36-year old conviction for which De Veau had received a suspended sentence.

12. Although section 8 was not itself part of the compact, it had been enacted prior to submission of the compact and was intended to be part of its comprehensive scheme.

> In light of the purpose, scope and background of this New York legislation and Congress' relation to it, . . . an inference of incompatibility has no foundation. . . . Here the States presented their legislative program to cope with an urgent local program to the Congress, and the Congress unambiguously supported what is at the core of this reform. Had §8 been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

De Veau, 363 U.S. at 153. Section 8 itself did not contemplate or require bi-state enforcement. *Id.* New Jersey, however, enacted a virtually identical provision. *See* N.J. Stat. Ann. §32:23-80 (West 1963).

ference of congressional intent to preempt *all* state legislation relating to employee choice of collective bargaining representatives; rather, they framed the issue as

> whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?

363 U.S. at 153. Congressional approval of the Waterfront Commission Compact made answering that question easy in *De Veau:* "In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation." *Id.* But Justice Frankfurter's formulation strongly implies that a court without access to similarly conclusive extrinsic evidence nevertheless should attempt to determine whether Congress would have intended to preclude the particular state legislation at issue.

Second, *De Veau* expressly recognized the importance of considering the particular situation and regulation at issue, rather than adopting a blanket approach to the preemption question.[13] Distinguishing *Hill v. Florida, supra*, Justice Frankfurter wrote:

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13. *See also* Local 1804, Internat'l Longshoremen's Ass'n v. Waterfront Comm'n, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (1981):

> The leading case of *DeVeau v. Braisted* . . . suggests three criteria for determining whether a federal law preempts section 8. The criteria are: (1) the extent to which the matter regulated involves matters of local responsibility or concern; (2) the degree to which the state law interferes with federal law; and (3) the amount of interference Congress was willing to tolerate.

> Nor was it true of *Hill v. Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry.

363 U.S. at 155; *see also id.* at 154 ("It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted.").

Third, *De Veau* is most important for the insight it provides courts trying to "imaginatively summon the likely reaction of Congress" to allegedly preempted legislation. Justice Frankfurter's opinion notes that Congress approved the Waterfront Compact despite its awareness of the restrictions embodied in section 8 and despite the urging of counsel for the International Longshoremen's Association (the union most likely to be affected by section 8) that the compact's implementation would conflict with federal labor policy. *See id.* at 151 (citing Hearing on H.R. 6286, H.R. 6321, H.R. 6343, and S. 2383 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 83d Cong., 1st Sess. 136). Congress apparently perceived the problem of labor corruption on the waterfront to be of sufficient severity that state regulation would not be inimical to federal labor policy.

One could argue, of course, that the Waterfront Commission Compact constituted a specifically legislated exception to the NLRA manifesting congressional assent only to the state legislation there at issue. Such a characterization of *De Veau* and its facts, however, would be inconsistent with the compact's genesis. The Waterfront Commission Compact was presented to and considered by Congress not because its authors and sponsors believed it to embody a scheme that contra-

vened the NLRA but because the Compact contemplated the establishment of a bi-state commission to combat evils that could not be eradicated by the two states acting individually. *See* H.R. Rep. No. 998, 83d Cong., 1st Sess. 3 (1953). In other words, it was the bi-state nature of the compact, and not any potential intrusion on national labor policy, that demanded congressional attention. Nothing in the Senate or House reports accompanying the compact suggests that Congress viewed its implementation as an exception to federal labor policy; rather, the Report of the House Judiciary Committee explicitly noted that "[t]he compact to which the committee here recommends that Congress grant its consent is in no sense antilabor legislation, but rather, antiracketeering legislation." *Id.* at 6.

I do not suggest that *De Veau* compels the conclusion that the NLRA does not preempt section 93 of the Casino Control Act; certainly the absence of a majority opinion there, and of a congressionally approved compact here, would undercut any such argument. At the same time, *De Veau* cannot be written off solely because it involved a compact, especially since the most plausible interpretation of its underlying scenario is that Congress did not view all state regulation of the qualifications of union officials as incompatible with the overall federal regulatory scheme.[14] The fact that the LMRDA does not preclude the states from enacting more stringent criteria than are embodied in section 504 supports that conclusion.

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14. The majority limits its discussion of *De Veau* solely to rebutting the notion that *De Veau* overruled *Hill*. The majority concludes quite correctly that it did not; indeed appellees have not argued otherwise, contrary to the majority's assertion. But having established that *Hill* has not been overruled, the majority cursorily concludes that "*DeVeau* . . . cannot, therefore, be read as impairing the authority of *Hill v. Florida*." Majority op., typescript at 39.

Because I conclude that section 7 does not necessarily preclude such state regulation, I therefore turn to the question whether New Jersey's regulation of unions associated with the casino industry is intended to effectuate the type of deeply rooted local interest contemplated by *Local 926 v. Jones, supra.*

III. *New Jersey's Interest*

It is virtually beyond dispute that comprehensive regulation of casino gambling, including regulation of unions representing industry employees, is "important . . . to [New Jersey] as a protection to its citizens."[15] *Id.* at 1459. Gambling is an industry that is particularly sus

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Note 14 — *(Continued)*

This off-hand dismissal is too hasty. First, to the extent that the majority predicates its conclusion on *De Veau's* failure to overrule *Hill*, it is important to keep in mind that the Supreme Court continually modifies prior holdings without overruling them. *See, e.g.*, EEOC v. Wyoming, 103 S. Ct. 1054 (1983) (limiting, without overruling, National League of Cities v. Usery, 426 U.S. 833 (1976)). Indeed Justice Frankfurter's opinion in *De Veau* expressly distinguished *Hill*, and not solely on the basis of the compact: "Nor was it true of *Hill v. Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155.

Second, the majority's analysis ignores *De Veau's* refusal blindly to apply *Hill's* prohibition against state imposition of dues-collecting sanctions. Indeed the fact that Congress acquiesced in the type of state-imposed sanctions struck down in *Hill* further undercuts the majority's reliance on congressional failure explicitly to overrule *Hill*.

15. Casino gambling traditionally has been considered to be within the purview of the states to regulate, and one court even has suggested that "gaming is a matter reserved to the states within the meaning of the Tenth Amendment . . . [leaving] no room for federally protected constitutional rights," State v. Rosenthal, 93 Nev. 36, ____, 559 P.2d 830, 836, *appeal dismissed*, 434 U.S. 803 (1977).

ceptible to infiltration and control by organized crime and racketeers. *See* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). Not only is this vulnerability documented by gambling's "checkered history in other jurisdictions," Staff Policy Group on Casino Gambling, *Second Interim Report* 2 (1977),[16] but the FBI has labelled gambling the "lifeblood of organized crime," *Hearings Before the Commission on the Review of the National Policy Toward Gambling* (May 10, 1976) (testimony of Frederick Fehl, Acting Assistant Director, FBI); *see United States v. Garrison*, 348 F. Supp. 1112, 1119 (E.D. La. 1972). As the Superior Court of New Jersey remarked in a similar context, "[t]he undesirability of an association between those previously convicted of a crime or those in affinity with such a person and this sensitive 'business of racing and the legalized gambling attendant thereupon,' is too apparent to justify extended discussion." *Niglio v. New Jersey Racing Commission*, 158 N.J. Super. 182, 188, 385 A.2d 925, 928 (App. Div. 1978).

Gambling does affect interstate commerce, however, and Congress has enacted a number of laws regulating the interstate aspects of gambling, *see, e.g.*, 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); *id.* §1084 (1976) (barring transmission of wagering information over interstate wires); *id.* §§1301-1307 (1976 & Supp. V 1981) (regulating lotteries); *id.* §1953 (1976 & Supp. V 1981) (barring interstate shipment of gambling paraphernalia).

16. *See also* Marshall v. Sawyer, 301 F.2d 639, 648-50 (9th Cir. 1962) (Pope, J., concurring) (discussing the known hazards of gambling that led to strict controls in Nevada); Nevada Tax Comm'n v. Hicks, 73 Nev. 115, ____, 310 P.2d 852, 854 (1957) ("Throughout this country, . . . gambling has necessarily surrounded itself with an aura of crime and corruption.").

Appendix A

Legalized casino gambling is particularly attractive to organized crime for two reasons:

> First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are.

Santaniello, *Casino Gambling: The Elements of Effective Control*, 6 Seton Hall Legis. J. 23, 23 (1982) (footnote omitted); *see also* New Jersey Commission of Investigation, *Report and Recommendations on Casino Gambling*, at III (1977) ("[T]he nature of the industry . . . makes it a vulnerable target for criminal intrusion.").

Awareness of the attractiveness of casino gambling to racketeers and concern that the industry therefore could not remain "clean" contributed to the defeat in 1974 of a state-wide referendum to allow casino gambling in Atlantic City; a second referendum passed in 1976 only after proponents assured the public that New Jersey would have the "strongest regulations of casinos in the world," that organized crime would be prevented from infiltrating the industry, that operating controls would be stringent, and that only those individuals of the highest character, integrity, and competence would be permitted to participate in casino operations. *See, e.g.*, *Strongest Law in World Offered for Atlantic City Casinos*, N.Y. Daily News, Oct. 1, 1976, at 40; *Lawmakers Reveal Casino Guidelines*, Newark Star Ledger, Oct. 1, 1976, at 1.[17]

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17. *Cf.* Knight v. City of Margate, 86 N.J. 374, 392, 431 A.2d 833, 842 (1981) ("Gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the [state] Constitution itself.").

Appendix A

Following the voters' approval of the referendum, the legislature held extensive hearings and, together with the Governor, commissioned reports on how best to insure that Atlantic City's casinos would remain clean. *See Hotel and Restaurant Employees v. Danziger, supra*, 536 F. Supp. at 322. These studies concluded that merely keeping organized crime from infiltrating the industry would be an insufficient goal; the success of the venture depend on gaining and retaining public trust in the industry's integrity. Thus the studies recommended legislation directed toward preventing even the appearance of impropriety. *See Report and Recommendations, supra; Second Interim Report, supra.* The reports also made clear that the achievement of those goals would require the regulation of every aspect of the industry, and not just the gaming operations.

> Profitability is . . . not a direct function of the quality of gaming or of the environment in and around the casino. Corporate corruption, cheating, loansharking, overextension of credit, insobriety, prostitution and a honky-tonk atmosphere are not antithetical to a desire for profit, and in the industry are occasionally viewed as legitimate societal overhead so long as they encourage, or at least do not interfere with, the vitality of the gambling market.
>
> The interests of the State in the success of casino gambling are not coterminous with the interests of the entrepreneur. While the latter measures a net return on investment against the degree of risk, the State must measure social and economic benefits against offsetting social, economic and environmental costs. What is acceptable by one measure may be unacceptable by the other. The staff policy group has concluded that the *uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casinos and related operations.*

Staff Policy Group, *Second Interim Report*, *supra*, at 1-2 (emphasis added).

The State Commission of Investigation (SCI), in formulating more specific recommendations, operated on the same premises and concluded that "only the most stringent of gambling control laws can thwart the infiltration of casinos and related services and suppliers by organized crime." Commission of Investigation, *Report and Recommendations, supra*, at II.[18] The SCI then made explicit that it was concerned not only with related services and suppliers but with labor unions as well. La-

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18. The SCI went into more detail in formulating its specific recommendations:

> Although the State Commission of Investigation and segments of law enforcement have been highly successful in removing many identified members of organized crime from New Jersey society, there remains a well-organized highly functional organized crime network in this state. Additionally, it is important to note that the appearance of organized crime is presently changing. As traditional sources of illegal funds become more limited and more easily detected and prosecuted, elements of organized crime have become significantly more interested in investing funds in legitimate enterprises.
>
> The infiltration of legitimate business by organized crime is a situation which society should be aggressive to prevent. In addition to providing a ready source of funds to capitalize illegal ventures, a convenient cash flow to disguise illegal profits, and an ostensibly legitimate occupation for organized crime members and associates, an incursion into legitimate enterprise is often accompanied by extortion, loansharking, commercial bribery, tax violations and anti-trust law infringements.
>
> Thus, it is the position of the S.C.I. that any casino gambling legislation should not only preserve and protect the integrity of the operation of casinos in Atlantic City, but should also foreclose the possibility of opening up new and fertile areas of legitimate business enterprise to elements of organized crime.
>
> The S.C.I.'s continuing organized crime program discloses that there are several identifiable legitimate enterprises which have long been a target of infiltration by organied [sic] crime. Further, the S.C.I.'s monitoring of the workings of organized crime in Atlantic City discloses substantial movement by

bor unions, the SCI asserted, could offer organized crime an entree into the casino industry:

> The S.C.I.'s experience and collected intelligence regarding organized crime strongly suggests that there are few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures.

Id. at 1-H.[19] The SCI therefore urged that unions representing employees of the casinos or their adjoining ho-

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organied [sic] crime in contemplation of a casino operation and the potential which it represents. The general approach which the S.C.I. deems advisable is the exposure to stringent licensing scrutiny by the gambling regulatory body of all industries of concern and particularly more of an ancillary nature.

The most efficacious legislative scheme must strike the proper balance between the magnitude of the State's interest in licensing certain service industries and the required administrative resources which will be necessitated. It would be overly burdensome to require licensure for all parties entering into a contractual relationship with the licensed hotel yet, as has been stated, it would be against the interests of the state not to require licensure [in] most other cases. The required scrutiny of the proposed provider should be directly proportional to the risk to the gaming industry and society as a whole. The risk is twofold: (a) that undesirable elements infiltrate the gaming industry through *direct involvement with the casino operation*, and (b) that undesirable elements either *indirectly affect the gaming industry through involvement with the hotel or are financially benefitted through profits recouped from endeavors relating to casino gaming.*

Id. at 1-C to 2-C (emphasis in original).

19. New Jersey's Attorney General recently expressed a simi-

tels be required to satisfy the same stringent qualification criteria required of casino operators. *Id.* at 1-H, 2-H.

Against this background, the New Jersey legislature enacted the Casino Control Act, including the provision challenged here. At the outset, the legislature displayed its awareness of the potential crime problems and their magnitude. The Act expressly declares its goals to include preventing criminal elements from gaining a foothold in the industry and avoiding any public perception that such a foothold even is available.[20]

NOTE 19 — *(Continued)*
lar view when testifying before the Senate Permanent Subcommittee on Investigations:

> Organized labor is in a prime position to exert tremendous pressure over the casino industry . . . . What would a casino owner pay for labor peace? How much is it worth to keep a business that grosses between $500,000 and $1 million a day free of a strike? A corrupt union could extort outright payments or use its power of persuasion to dictate what firms get the lucrative ancillary service contracts within the casino industry.

Quoted in Court Delay Seen in Casino Dispute, N.Y. Times, Oct. 10, 1982, at 55, col. 1.

20. The Act enumerates seventeen policy declarations and findings of fact, four of which are relevant here:

> (6) An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the comprehensive law-enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.
>
> (7) Legalized casino gaming in New Jersey can attain, maintain and retain integrity, public confidence and trust, and

The Act seeks to achieve these goals in two ways. First, the legislature created two separate agencies — the Casino Control Commission and the Division of Gaming Enforcement — to share responsibility for insuring the integrity of the casino industry; a system of checks and balances exists between the two agencies to keep the regulatory process itself above reproach.[21] Sec-

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remain compatible with the general public interest only under such a system of control and regulation as insures, so far as practicable, the exclusion from participation therein of persons with known criminal records, habits or associations, and the exclusion or removal from any positions of authority or responsibility within casino gaming operations and establishments of any persons known to be so deficient in business probity, ability or experience, either generally or with specific reference to gaming, as to create or enhance the dangers of unsound, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incident thereto.

. . . .

(9) Since casino operations are especially sensitive and in need of public control and supervision, and since it is vital to the interests of the State to prevent entry, directly or indirectly, into such operations or the ancillary industries regulated by this act of persons who have pursued economic gains in an occupational manner or context which are in violation of the criminal or civil public policies of this State, the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid entry of such persons into the casino operations or the ancillary industries regulated by this act.

. . . .

(15) Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds and records of behavior to control casino gaming operations contrary to the vital law enforcement interest of the State.

N.J. Stat. Ann. §5:12-1 (West Supp. 1982).

21. For a comprehensive discussion of this regulatory process, including the mechanisms designed to guarantee its integrity, *see* Cohen, *The New Jersey Casino Control Act: Creation of a Regulatory System*, 6 Seton Hall Legis. J. 1 (1982).

ond, and more important for our purposes, the legislature accepted the recommendations of the SCI and the Governor's Staff Policy Group regarding the necessary breadth of control and granted the two agencies authority to regulate all aspects of the casino industry, including labor unions. As the Commission points out in its brief, the statutory and administrative controls over the casino gaming industry are "extraordinary pervasive and intensive." *Knight v. City of Margate*, 86 N.J. 374, 381, 431 A.2d 833, 836 (1981).

In sum, New Jersey's comprehensive regulation of the casino industry is a matter of intense and extraordinary local interest. Such regulation is not only essential to the State's struggle to maintain the integrity of the industry, but the very prospect of such comprehensive legislation was the basis upon which New Jersey's citizens consented to casino gambling in the first place. Given the unique nature of the industry — in particular its tremendous, unmonitored cash flow and its consequent attractiveness to racketeers and organized crime — the concerns of the legislature and citizenry cannot be characterized as anything less than "deeply rooted in local feeling and responsibility." *Local 926 v. Jones, supra*, 103 S. Ct. at 1459.

IV. *Preemption Doctrine Applied*

As I noted at the outset, *Local 926 v. Jones* teaches that the NLRA does not necessarily preempt state legislation when the state's interest is as strong as New Jersey's is here. Rather, "[t]he question of whether regulation should be allowed . . . involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens." *Local 926 v. Jones, supra*, 103 S. Ct. at 1459. It is indisputable that New Jersey's interest in comprehensive regulation of casino gambling is "deeply rooted

in local feeling and responsibility," *id.* at 1458, and that the restrictions on persons who may be associated with the industry — in whatever capacity — are of manifest importance to the State "as a protection to its citizens," *id.* at 1459. And while I acknowledge that invocation of the sanctions provided by section 93 of the Casino Control Act may curtail the full exercise of section 7 rights, given the unique dangers posed by criminal infiltration of casino gambling, I cannot say that New Jersey's interest is outweighed by "any harm to the regulatory scheme established by Congress." Rather, Congress' acquiescence in the legislation at issue in *De Veau* suggests a congressional perception that, in situations where the threat to the welfare to the state is so pervasive and so well-documented that the need for comprehensive state regulation is manifest, such regulation will be permissible even if it includes a component that directly restricts section 7 rights.[22] I believe such situations to be rare, but I also believe that one is presented here.

Moreover, as the Court of Appeals for the Second Circuit has noted in discussing section 8 of the New York Waterfront Commission Act, the type of restrictions here at issue are a rather limited intrusion on section 7 rights. "The Act does not prohibit the election of these men to offices in [other] locals nor does it prohibit the collection of dues outside New York State from [other] longshoremen. It simply prevents corrupt union officials from contributing to a longstanding problem of criminal wrong-doing on the New York waterfront."[23] *In-*

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22. I read *Local 926* as consistent with this view.

23. *See also* Hazelton v. Murray, 21 N.J. 115, 123, 121 A.2d 1, 5-6 (1956) (Brennan, J.) (sustaining §8 of New Jersey's Waterfront Commission Act) ("If the conviction of crime is a proper consideration related to the public interest for the purposes of licensing and registering waterfront workers, much more so is the provision here under review which would wrest from the vicious criminal combine the means through which the corrupt conspiracy was perpetrated.").

ternational Longshoremen's Association v. Waterfront Commission, 642 F.2d 666, 672 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981).

Indeed the parallels between the New York Waterfront Commission Act and the Casino Control Act are striking. Like the New York Waterfront Commission Act, *see De Veau*, 363 U.S. at 147-51, the Casino Control Act was passed only after extensive hearings, reports, and public outcry demanded the institution of stringent regulation to keep the industry clean. In both cases, the intent and effect of the state regulation was not directed particularly toward labor but, rather, toward the establishment of a comprehensive scheme in which union regulation was only one necessary component.[24] To be sure, the New York legislature enacted the Waterfront Commission Act only after the situation on the docks had already reached "appalling" proportions, *see id.* at 147, and New York's action therefore might be said to have been based on "harder" evidence of need than was New Jersey's. But to write into preemption jurispru-

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24. Like the Casino Control Act, the legislation to clean up the New York Waterfront did not merely regulate union officials:

> [The Commission has the] power to license, register and regulate the waterfront employment of pier superintendents, hiring agents, longshoremen and port watchmen, and to license and regulate stevedores. [The compact] entirely prohibits one class of waterfront employment, public loading, found to be unnecessary and particularly infested with corruption. . . . The issue of licenses to engage in waterfront occupations, or the right to be registered, depends upon findings by the Commission of good character. In particular, past convictions for certain felonies constitute specific disabilities for each occupation, with discretion in the Commission to lift the disability, except in the case of port watchmen, where it constitutes an absolute bar to waterfront employment. A new procedure for the employment of longshoremen is also provided under the supervision of the Commission, replacing the archaic, corrupt 'shape-up.'

De Veau, 363 U.S. at 149.

dence a distinction between remedial and prophylactic legislation would prevent states from acting until an industry is so rife with corruption that "criminals, racketeers, and hoodlums [have] acquired a stranglehold," *Hazelton v. Murray*, 21 N.J. 115, 120, 121 A.2d 1, 4 (1956) (Brennan, J.) (describing condition of New York/New Jersey waterfront prior to compact and sustaining constitutionality of provision of New Jersey law identical to provision sustained in *De Veau*). The inefficiency of such a distinction is manifest; to say that federal labor policy requires it would offend reason.

The majority rejects New Jersey's contention that gambling is unique and notes that other industries, such as solid-waste disposal, "have also been identified as susceptible of infiltration by organized crime." Majority op., typescript at 40-41 (footnote omitted). Although it is true that other industries have been so identified, the majority's argument ignores the specifics of this situation and this industry. The casino industry *is* different: the huge number and the staggering aggregate amount of unrecorded cash transactions[25] make legalized gambling far more attractive to and ripe for criminal infiltration than are other industries. Moreover, New Jersey has adequately demonstrated through studies, hearings, and the experience of other jurisdictions, that these dangers can be avoided only by means of a comprehensive scheme that includes regulation of all aspects of the industry.[26] We are not dealing here with a display of anti-labor animus on the part of the New Jersey legislature; rather, we have before us a conscientous and well-reasoned attempt to erect a breakwater against a tide of vice and corruption that could engulf Atlantic City's casinos.

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25. The "handle," i.e., the total amount of money bet, in Atlantic City's casinos was more than $5 billion in 1982.

26. The majority accurately notes that the NLRB has consistently asserted jurisdiction over the casino industry; indeed I do not

Finally, the mere fact that another state may attempt to regulate another industry in a way or to an extent that effectively would undermine the right of employees to choose their bargaining representatives does not mean that section 93 offends federal labor policy.

NOTE 26 — *(Continued)*
contend that the NLRB should not do so here. But the majority implies that the exercise of the NLRB's jurisdiction cannot be reconciled with state regulation such as section 93 and that section 93 must therefore be deemed incompatible with the NLRA's regulatory framework. This implication is incorrect, for the NLRB continues to exercise jurisdiction over the New York waterfront, despite the vitality of the restriction upheld in *De Veau*.

In addition, I note that the NLRB, in declining jurisdiction over labor disputes in the dog-racing and horse-racing industries, has suggested that state regulation of labor, when it is part of a pervasive industry-wide scheme, is not necessarily inconsistent with national labor policy:

> In prior decisions, the Board declined to assert jurisdiction over these industries noting, inter alia, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States' continuing interest in and supervision over the industries.

Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (1973) (codified at 29 C.F.R. §103.3 (1982)). Although a district court held that the rule violates the NLRB's statutory mandate, *see* New York Racing Ass'n v. NLRB, 110 L.R.R.M. 3177 (E.D.N.Y. 1982) (NLRB may decline jurisdiction only over industries not substantially affecting interstate commerce), that decision was recently vacated, Nos. 82-6252, -6258 (2d Cir. May 10, 1983) (district court does not have jurisdiction to review such NLRB rules).

The admitted difficulty of drawing lines does not allow us to abdicate our responsibility to do so. There are distinctions both between the provisions at issue here and the broad regulation of labor unions struck down in *Hill*, as well as between the pressing need to regulate this industry and the mere desire to do so in other areas. These distinctions are not merely theoretical; they are readily apparent and enormously important.

In sum, given the magnitude of New Jersey's interest in comprehensively regulating of the casino industry, and my conclusion that such regulation does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted), I would hold that the NLRA does not preempt section 93 of the Casino Control Act.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
for the District of New Jersey

Civ. A. No. 81-2630

536 *F. Supp.* 317 (D.N.J. 1982)

Decided March 22, 1982

On Motion for Temporary Injunction Pending Appeal
April 12, 1982

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and Frank Gerace,

Plaintiffs,

v.

Martin DANZINGER, Acting Chairman, Donald Thomas, Commissioner, Madeline McWhinney, Commissioner, Carl Zeitz, Commissioner, Casino Control Commission and G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement and Department of Law and Public Safety, Division of Gaming Enforcement and Thomas H. Kean, Governor,

Defendants.

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Bernard N. Katz, N. Michael Katz, Meranze, Katz, Spear & Wilderman, Atlantic City, N. J., for plaintiffs.

Robert J. Genatt, Lawrenceville, N. J., Gen. Counsel, New Jersey Casino Control Comm., by Thomas N. Auriemma, Deputy Director, Legal Div., Trenton, N. J., for defendants Danzinger, Thomas, McWhinney, Zeitz and Casino Control Comn.

Irwin I. Kimmelman, Atty. Gen. by Michael R. Cole, G. Michael Brown, Asst. Attys. Gen. Anthony J. Parrillo, James M. Flanagan, Deputy Attys. Gen., Div. of Gaming Enforcement, Trenton, N. J., for defendants Brown, Div. of Gaming Enforcement and Kean.

Robert I. Segal, Haddonfield, N. J., and John J. Reynolds, Chicago, Ill., for amicus curiae Hotel and Restaurant Employees and Bartenders Union, AFL-CIO.

Howard J. Casper, Cherry Hill, N. J., for amicus curiae International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 331.

Thomas P. Foy, Hartman, Schlesinger, Schlosser & Faxon, Mount Holly, N. J., for amicus curiae New Jersey State AFL-CIO.

BROTMAN, District Judge.

New Jersey's Casino Control Act, L.1977, c. 110, § 1 *et seq.*, as amended by L.1978, c. 7, § 1 *et seq.*, N.J.Stat. Ann. § 5:12-1 *et seq.* (West Supp.1981) (hereinafter the "Act"), establishes the conditions under which the nascent casino gambling industry in Atlantic City, New Jersey, is to be regulated. Section 93 of the Act, N.J. Stat.Ann. § 5:12-93 (West Supp.1981), prohibits labor organizations representing employees of casinos and

casino hotels from collecting dues from those employees, or from administering pension and welfare funds, unless the union has registered with the Casino Control Commission and the union's officers, agents and key employees have met certain qualifications delineated in § 86 of the Act. N.J.Stat.Ann. § 5:12-86 (West Supp.1981). (Portions of the Casino Control Act are set forth in the Appendix to this opinion.)

Hotel and Restaurant Employees and Bartenders International Union Local 54 (hereinafter "Local 54"), and its president, Frank Gerace, filed this action seeking a declaration that these provisions of the Casino Control Act may not constitutionally be enforced against them. Plaintiffs also seek injunctive relief and damages. It is pleaded that application of the Act against the plaintiffs is preempted by the National Labor Relations Act of 1935, *infra*, the Labor-Management Reporting and Disclosure Act of 1959, *infra*, and the Employee Retirement Income and Security Act of 1974, *infra*, and that the Act is thereby invalidated under the Supremacy Clause of the Constitution. U.S.C.A. Const. Art. VI, cl. 2 (West 1968). Plaintiffs also plead that the Act is vague and overbroad, that it is invalid under the First and Fourteenth Amendments and under the Contract Clause. U.S.C.A.Const. Art. I, § 10 (West 1968). The case is currently before the court on a motion for a preliminary injunction, in support of which plaintiffs have advanced their arguments under the Supremacy Clause, their vagueness and overbreadth claims and their First Amendment claims.

Appendix B

I. BACKGROUND

Pursuant to the power granted it by the Constitution of the State of New Jersey, N.J.Stat.Ann.Const. Article 4, § 7, ¶ 2 D (West Supp. 1981), the New Jersey Legislature enacted the Casino Control Act, *supra*, in 1977, establishing the conditions under which casino gambling in Atlantic City would be conducted and controlled. The Act establishes the Casino Control Commission in the Department of Treasury, N.J. Stat.Ann. § 5:12-5 (West Supp.1981), and the Division of Gaming Enforcement in the Department of Law and Public Safety. N.J.Stat. Ann. § 5:12-55 (West Supp.1981). The Casino Control Commission is charged with the duties of passing on applications for licenses, N.J.Stat.Ann. §§ 5:12-63 and 64 (West Supp.1981), and the Division of Gaming Enforcement is empowered to investigate the qualifications of applicants for licenses, and to present its views on such applications to the Commission. N.J.Stat.Ann. §§ 5:12-76 through -79 (West Supp.1981).

In connection with the development of casino gambling in Atlantic City, the Legislature has found and declared seventeen aspects of "the public policy of this State," and has listed them in § 1 of the Act. N.J.Stat.Ann. § 5:12-1 b (West Supp.1981). It is in consonance with these aspects of public policy that the Act is likely to be enforced. *New Jersey Builders Owners and Managers Association* v. *Blair*, 60 N.J. 330, 338, 288 A.2d 855 (1972). The ones which are most pertinent to this court's inquiry are as follows:

> (6) An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in

the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the comprehensive law-enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.

(7) Legalized casino gaming in New Jersey can attain, maintain and retain integrity, public confidence and trust, and remain compatible with the general public interest only under such a system of control and regulation as insures, so far as practicable, the exclusion from participation therein of persons with known criminal records, habits or associations, and the exclusion or removal from any positions of authority or responsibility within casino gaming operations and establishments of any persons known to be so deficient in business probity, ability or experience, either generally or with specific reference to gaming, as to create or enhance the dangers of unsound, unfair or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incident thereto.

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(9) Since casino operations are especially sensitive and in need of public control and supervision, and since it is vital to the interests of the State to prevent entry, directly or indirectly, into such operations or the ancillary industries regulated by this act of persons who have pursued economic gains in an occupational manner or context which are in violation of the criminal or civil public policies of this State, the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid entry of such persons into the casino operations or the ancillary industries regulated by this act.

• • •

(13) It is in the public interest that the institution of licensed casino establishments in New Jersey be strictly regulated and controlled pursuant to the above findings and pursuant to the provisions of this act, which provisions are designed to engender and maintain public confidence and trust in regulation of the licensed enterprises, to provide an effective method of rebuilding and redeveloping existing facilities and of encouraging new capital investment in Atlantic City, and to provide a meaningful and permanent contribution to the economic viability of the resort, convention, and tourist industry of New Jersey.

• • •

(15) Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds

and records of behavior to control casino gaming operations contrary to the vital law enforcement interest of the State.

N.J.Stat.Ann. § 5:12-1 b (West Supp.1981).

These declarations reveal a serious concern with the possibility that casino gambling in Atlantic City—along with the governmental entities which are bound to control it—has the potential to serve as a vehicle for the violence, extortion and lawlessness which have plagued gaming industries in other contexts. The Legislature had before it many studies on the possibilities for corruption and crime which might have been created by the introduction of legalized gaming. *E.g., Second Interim Report of the New Jersey Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations by the State Commission of Investigation* (April 1977). The reports were based on studies of gaming industries around the world and in other states. *See Second Interim Report of the Staff Policy Group, supra.* Numerous public hearings on the matter were also held. Certainly it was no puritanical aversion to games of chances which brought the Legislature to the conclusion that strict control over all aspects of the new industry would be necessary to prevent it from befouling all that it touched and all that touched it. It is unquestioned that the history of legalized gambling in all of its forms demonstrates that it is extraordinarily susceptible to control and abuse by criminals employing methods of violence and bribery. *Id.;* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). The roots of corruption, spread far enough,

can undermine the very foundations of public confidence in government itself, and the recitations of public policy in the Act show an awareness of this.[1] Accordingly, a comprehensive licensing system was established, which extended not only to those who were to own, manage and be employed by casinos, but also to ancillary services, such as the supplying of gaming devices. N.J. Stat.Ann. §§ 5:12-80 through -95.11 (West Supp.1981).

Labor organizations are not immune to the possibilities of corruption. The Governor's Staff Policy Group reported, "Both legally recognized and unrecognized employee organizations have been reported to be a source of corruption in other jurisdictions." *Second Interim Report, supra,* at 46. The State Commission of Investigation reported that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures.

Report and Recommendations, supra, at 2. It can not be doubted that the large number of unrecorded transactions which are associated with gambling can multiply the effects of the phenomenon described by the Commission of Investi-

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[1] "The whore and gambler, by the state Licensed, build that nation's fate."

Wm. Blake, *Auguries of Innocence,* (Pickering Manuscripts, *c.* 1801).

gation. In enacting the Racketeer Influence and Corrupt Organizations (RICO) Act, 84 Stat. 941, 18 U.S.C.A. §§ 1961 *et seq.* (West Supp.1981), in 1970, Congress recognized the explosiveness of the combination of labor racketeering and gambling by declaring:

> [O]rganized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitations; . . . this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions. . . .

Pub.L. 91-452, § 1, *reprinted following* 18 U.S.C.A. § 1961 (West Supp.1981).

Similar to the licensing provisions discussed above is § 93 of the Act, which requires that "[e]ach labor organization, union or affiliate seeking to represent employees licensed under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . ." N.J.Stat.Ann. § 5:12-93 a (West Supp.1981). Although the registration requirement differs in some respects from the licensing requirement which applies to a casino service industries, N.J.Stat.Ann. § 5:12-92 (West Supp.1981), casino hotel employee, N.J.Stat.Ann. § 5:12-91 (West Supp.1981), its effect is similar to the licensing requirement. Section 93 goes on to state that officers, agents and principal employees of the labor organization, union or affiliate requqired to register must pass muster under § 86 of the Act, which lists criteria for disqualification of applicants for licenses. N.J.Stat.Ann. §§ 5:12-86 and 93 b (West Supp.1981). Failure of key employees of such a union to

meet the standards of § 86 does not bar the union from acting as the collective bargaining representative of the licensed employees, but it does visit certain other restrictions on the union; *i.e.*, the union is forbidden to receive any dues from any licensed casino employee, and is also forbidden to "administer any pension or welfare funds." N.J.Stat.Ann. § 5:12-93 b (West Supp.1981). As with hotel employee licenses, N.J.Stat.Ann. § 5:12-91 e (West Supp. 1981), the Casino Control Commission is given discretion to "waive any disqualification criteria [of § 86] consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.Stat.Ann. § 5:12-93 b (West Supp.1981).

No one involved in these proceedings has argued that it was irrational for the Legislature to decide to subject representatives of licensed employees to some form of regulation and control. The wisdom of the legislation is not here at issue. The question is a narrower one of the scope within which the state's regulation of such unions is permitted to operate by the Constitution, the breadth of the inquires which may be made, and the nature of the sanctions which may be applied.

We start with the premise that the state's regulation of gambling is subject to constitutional limitations. *Bally Manufacturing Corp.* v. *Casino Control Commission*, 534 F. Supp. 1213, 1220 (D.N.J.1982); *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962). The argument of the Division of Gaming Enforcement that constitutional scrutiny of the regulations at issue is barred by the Tenth Amendment[2] is

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[2] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.C.A. Const. Amend. X (West 1972).

weakly supported. In *State* v. *Rosenthal*, 93 Nev. 36, 559 P.2d 830, *appeal dismissed*, 434 U.S. 803, 98 S.Ct. 32, 54 L.Ed.2d 61 (1977), it was stated that this view was unnecessary to the decision of the case. Other courts have proceeded on the assumption that Congress may regulate gambling insofar as it affects the flow of interstate commerce, as it does here, and in so doing may preempt the power of the states to do the same. *See Marshall* v. *Sawyer*, *supra*, 301 F.2d at 649 n.3 (Pope, J., dissenting). It was not many years ago that Congress had prevented the states from running their own lotteries as they saw fit. *Development of the Law of Gambling, 1776-1976*, *supra*, at 539 *et seq.* The defendants' incantation of the word "gambling" does not prevent the application of federal constitutional standards to the actions of the state.

II. FINDINGS OF FACT

The facts essential to the determination of the motion are as follows:

1. Plaintiff Hotel and Restaurant Employees and Bartenders International Union Local 54 is an unincorporated labor organization within the meaning of § 2(5) of the National Labor Relations Act, as amended, *infra*, representing, *inter alia*, about 8,000 licensed employees of the casinos and casino hotels in Atlantic City, New Jersey, in collective bargaining and other matters affecting employer-employee relations. Plaintiff Frank Gerace is president of Local 54.

2. Frank Gerace is a trustee of the Hotel Employees and Restaurant Employees and Bartenders International

Union Pension Fund, as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Health & Welfare Fund. Local 54, through its officers, participates in the operation of these funds, both of which are employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974, *infra*. (Plaintiffs' Exhibit 5).

3. Local 54 filed its annual registration statement as required by the Casino Control Act in 1978. On May 12, 1981, the defendant Division of Gaming Enforcement, following its investigation of the applicant, stated its objections to the application. (Plaintiffs' Exhibit 2).

4. The Casino Control Commission thereupon ordered that hearings on the subject of Local 54's registration commence on September 9, 1981. (Affidavit of Frank Gerace, August 17, 1981, ¶2; Defendants' Exhibit 3).

5. Local 54 has posed to the Casino Control Commission certain of its objections to the registration requirement, the conduct of its officers being the subject of a hearing, and to the possibility that the sanctions of § 93 of the Casino Control Act may be imposed. (Plaintiffs' Exhibit 4). The Commission has held that it is without jurisdiction to reach the constitutional objections to § 93. (Plaintiffs' Exhibit 4).

6. The Casino Control Commission has adjourned the hearing scheduled for September 9, 1981, pending determination of the instant motion for preliminary relief. (Defendants' Exhibit 3).

Appendix B

III. JURISDICTION

[1] Having raised the question of whether the Casino Control Act is preempted by federal statutes regulating commerce, plaintiffs have properly invoked 28 U.S.C.A. § 1331 (West Supp.1981) and 28 U.S.C.A. § 1337 (West Supp.1981) as sources for this court's jurisdiction. *Cab Operating Corp.* v. *City of New York,* 243 F.Supp. 550, 552 (S.D.N.Y.1965). The allegations concerning denial of rights granted by the First and Fourteenth Amendments support our jurisdiction under 28 U.S.C.A. § 1343 (West Supp. 1981).

Defendants argue that we should apply the principle of abstention and decline to exercise our jurisdiction in this case.[3] We are told that under the doctrine of *Younger* v. *Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), we may not interfere with the state's administrative hearings by enjoining them. Additionally, the defendants invoke the doctrine of *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and *Alabama Public Service Commission* v. *Southern Railway,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1950). They argue that *Burford* abstention is required because this case presents complex questions of state law which relate to matters of substantial public import, the resolution of which might be disruptive of state efforts to implement a coherent regulatory

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[3] Plaintiffs suggested at oral argument that the abstention issue should not be reached because defendants had filed no motions for dismissal on the grounds of abstention. Such a motion was subsequently filed. Since abstention goes to questions of the court's jurisdiction, we may consider the issue on our own motion. Rule 12(h)(3), Fed.R.Civ.P. The issue was fully briefed and argued by both sides, and deferral of the issue would serve no purpose.

framework. The final ground for abstention is based on the argument that the questions here presented should first be brought to state tribunals, which would then have the opportunity to construe the Casino Control Act in a way which might obviate the necessity for a decision of the federal constitutional questions or substantially modify the constitutional issue. This argument is based on *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See generally*, 1A, Pt. 2 Moore's Federal Practice, ¶ 0.203 *et seq.* (2d Ed.1981).

[2] The *Younger* doctrine does not apply to this case. The rule which restricts the federal courts' power to enjoin state proceedings is applicable only to those proceedings which are initiated by the state. *Johnson* v. *Kelly*, 583 F.2d 1242, 1247, 1249 (3rd Cir. 1978); *Bally Manufacturing Corp.* v. *Casino Control Commission*, 534 F.Supp. 1213, 1218-20 (D.N.J.1982); *Santiago* v. *City of Philadelphia*, 435 F.Supp. 136, 145 (E.D.Pa.1977). It is recognized that on this motion the plaintiffs seek to restrain the hearings which were, in fact, scheduled at the instance of the Casino Control Commission. Nevertheless, the entire registration procedure is one which is initiated by the applicant, and it is the validity of the entire procedure which is in question in this case.

[3] Nor is the *Burford* doctrine applicable to this case. This court's recent opinion in *Bally Manufacturing Corp.* v. *Casino Control Commission, supra*, at 1222-23 explained why *Burford* was inapplicable in a similar case. While there are some differences between the procedural postures of that case and the one at hand, it remains true that the questions of state law are neither so technical nor so complex as to require abstention. We do not think that constitutional scrutiny, which inevitably must be applied to

the statute, would so seriously disrupt the functioning of the state's policies as to counsel more delay of that scrutiny than would otherwise be required.

[4] The most forceful arguments counseling abstention emanate from the line of cases beginning with *Pullman, supra.* Our inquiry under *Pullman* is to determine whether the federal issues may be avoided as a result of a state court's construction of the Casino Control Act. To a large extent the decision on whether to abstain depends on the nature of the federal question presented. Where several federal questions are presented, as here, some of the questions may be avoidable and others unavoidable. The court must consider the applicability of the *Pullman* doctrine to each of the federal claims separately, and will discuss the matter more fully in connection with the discussion of the merits of each of the questions presented.

IV. DISCUSSION and CONCLUSIONS OF LAW

To prevail on a motion for preliminary injunctive relief, the moving party must show that it has a reasonable likelihood of eventual success in the litigation, that it will be irreparably injured *pendente lite* if the preliminary relief is not granted, that a balance of equities favors the party seeking preliminary relief, and that the public interest will not be disserved by the issuance of the preliminary injunction. *Constructors Association of Western Pennsylvania* v. *Kreps,* 573 F.2d 811, 814-15 (3rd Cir. 1978), and cases cited therein; *Estate of Presley* v. *Russen,* 513 F.Supp. 1339, 1352-53 (D.N.J.1981). The court will discuss each of the plaintiffs' claims with these standards in mind.

Appendix B

A. *Preemption of the Casino Control Act by Federal Labor Legislation*

The plaintiffs claim that § 93 of the Casino Control Act conflicts with Congressional enactments dealing with labor relations, including those portions of the federal statutes which are intended to guarantee to employees the right to select collective bargaining representatives of their own choosing. The possibility that Local 54 will be prevented from collecting dues and administering pension, health and welfare funds is said to create a direct impediment to effectuation of the rights of self-organization guaranteed to employees by § 7 of the National Labor Relations Act of 1935, *infra*, 29 U.S. C.A. § 157 (West 1973). This section states that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ...

Id.

[5] The Supremacy Clause of the Constitution, U.S. C.A.Const. Art. VI, cl. 2 (West 1968), provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* State provisions which conflict with federal laws are without effect. *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). It was recently stated by the Supreme Court that consideration

under the Supremacy Clause must start "with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 516 (1981); see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Congressional intent to supersede the power of a state to pass a particular regulation may be found, however, where the scheme of federal regulation is so pervasive that there is no room for state regulation in the same field, or where the state regulation may produce a result inconsistent with the objective of the federal statute. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S., at 230, 67 S.Ct., at 1152. A state enactment may be void to the extent that compliance with both the federal and state statutes is impossible or where the statute frustrates Congressional goals. *See generally, Maryland* v. *Louisiana*, *supra*, 451 U.S., at 746-47. Where preemption is the issue, "each case turns on the peculiarities and features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973) *citing Hines* v. *Davidowitz*, *supra*, and *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960).

Plaintiffs argue that § 1 of the National Labor Relations Act of 1935 (the "NLRA" or the "Wagner Act"), 49 Stat. 449, as amended 61 Stat. 136, 29 U.S.C.A. § 151 (West 1973), along with § 2 of the Labor-Management Reporting and Disclosure Act of 1959 (the "Landrum-Griffin Act" or the "LMRDA"), 73 Stat. 519, 29 U.S.C.A. § 401 (West 1975), evince a Congressional intention that protection of employees' ability to choose their bargaining representatives be exclusively a federal

concern, not to be interfered with by state enactments such as the one under consideration in this case. These two sections are statements of federal policy which must be considered in determining the preemptive reach of the acts. Section 1 of the Wagner Act states in part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C.A. § 151 (West 1973). In § 2 of the LMRDA Congress stated:

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection. . . .

29 U.S.C.A. § 401(a) (West 1975). Of course, the more substantive portions of these enactments must also be considered.

Section 504 of the Landrum-Griffin Act, 29 U.S.C.A. § 504 (West 1975), operates as a restraint against certain persons from acting as key employees or leaders

of labor organizations, much in the same way as does § 93 of the Casino Control Act, when applied in conjunction with § 86 of the Act. Section 504 bars persons convicted of certain enumerated crimes from serving in such positions for five years following their convictions or the end of their imprisonment unless certain prerequisites relating to pardon or parole have been met. The Casino Control Act lists more crimes than are listed in § 504, and extends the disability to ten years. *See* N.J.Stat.Ann. § 5:12-86c(1), (2), (3), (4) (West Supp.1981). It is argued that the Congressional policy statements quoted above should lead us to conclude that the bars erected by § 504 may only be enforced in the manner provided by the federal enactment. Alternatively, plaintiffs state that even if the states may establish their own mechanisms for enforcing provisions similar to § 504, the enumeration of disabilities in § 504 is exclusive, and may not be extended by state laws such as the Casino Control Act.

The merits of plaintiffs' argument that application of the Casino Control Act to them is barred by the LMRDA, including § 504 and § 1, *supra,* are easily disposed of by reference to *DeVeau* v. *Braisted,* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960). In that case the Supreme Court considered whether § 8 of the New York Waterfront Commission Act of 1953 was preempted by the NLRA and the Landrum-Griffin Act. The act there examined was enacted pursuant to a bistate compact approved by Congress in 1953 under Article I, § 10 of the Constitution, the Compact Clause. U.S.C.A.Const. Art. I, § 10, cl. 3 (West 1968). It established a system for licensing employees on the waterfront of the Port of New York. *DeVeau* v. *Braisted,*

supra, at 147-51, 80 S.Ct. at 1148-50. Section 8 thereof provided that no person could collect dues from licensed waterfront employees on behalf of any labor organization if any officers or agents of the labor organization had ever been convicted of any felony, unless those officers or agents had been pardoned or paroled. *DeVeau, supra,* at 145, 80 S.Ct. at 1147. Like the Casino Control Act, the legislation under attack in *DeVeau* v. *Braisted* was more comprehensive in its restriction on employees' freedom to choose bargaining representatives than § 504 of the LMRDA. In explaining why the Waterfront Commission Act was not preempted by the LMRDA, the Court, in an opinion by Mr. Justice Frankfurter, stated:

> The fact that Congress itself has . . . imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. Appellant, however, argues that any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504(a), is impliedly barred by it. Just the opposite conclusion is indicated by the 1959 Act, which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the 1959 Act it expressly so provided. Sections

205(c) and 403, set out in the margin,[2] are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504(a). That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the Waterfront Commission Act. In addition, two sections of the 1959 Act, both relevant to this case, affirmatively preserve the operation of state laws. That § 504(a) was not to restrict state criminal law enforcement regarding the felonies there enumerated as federal bars to union office is provided by § 604 of the 1959 Act: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violation, which are listed in § 504(a)]." And to make the matter conclusive, § 603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act. Section 603(a) provides: "Except as explicitly provided to the contrary, nothing in this act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any State. . . ." In view of this explicit and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504(a)

Appendix B

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[2] Section 205(c) provides:

> ". . . No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency. . . ."

Section 403 provides:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. . . . The remedy provided by this title for challenging an election already conducted shall be exclusive."

Id., at 156-57, 80 S.Ct. at 1152-53.

[6] The opinion of Mr. Justice Brennan is to the very same effect: "[T]he Labor-Management Reporting & Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." *Id.*, at 160-61, 80 S.Ct. at 1154-55. It is to be noted that the Court's analysis of the Waterfront Commission Act's relationship to the LM RDA does not in any way turn on the circumstances that Congress had approved the bistate compact dealing with labor corruption on the piers. The Court considered Congressional approval of the compact only insofar as it may have diminished the preemptive reach of the Wagner Act. *Id.*, at 151-55, 80 S.Ct. at 1150-52. Therefore, plaintiff's argument that *DeVeau* must be confined to situations where Congress has explicitly made exceptions to the asserted preemptive effect of the Landrum-Griffin Act is insupportable. Justice Frankfurter's reading of the history and purpose of the LMRDA has been subject to some criticism,

see DeVeau, supra, at 161-65, 80 S.Ct. at 1155-58 (Douglas, J., dissenting); Note, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption,* 49 Fordham L.Rev. 1038, 1053-56 (1981), but it is not subject to question by this court. *Spindel* v. *Spindel,* 283 F.Supp. 797, 802 (E.D.N.Y.1968). We are required to hold that plaintiffs are not likely to succeed on the merits of their claim that the Casino Control Act is preempted by the LMRDA.

Plaintiffs' claim that the Casino Control Act is preempted by the NLRA is considerably more problematic. The starting point for this argument is *Hill* v. *Florida,* 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945). In that case, the Court upheld a challenge to a state law which required each labor union operating in the state to file a written report, accompanied by a filing fee of $1.00, with Florida's Secretary of State listing the names and addresses of its officers. The law further prohibited any person from acting as a business agent for any union unless the person were granted a license by the State. A business agent licensee was required to pay a $1.00 license fee, to show that he was a person of good moral character, and to show that he had not been convicted of a felony. Neither the union nor its business agent had complied with the registration requirement, and they had been enjoined from operating as such by the Florida courts. *Id.,* at 539-41, 65 S.Ct. at 1374.

The Court reversed the decree of the Supreme Court of Florida affirming the lower court's decree granting injunctive relief. It was held:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in

> and of itself, conflict with the Federal Act. But for failure to comply, the union has been enjoined from functioning as a labor union. . . . It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.

Id., at 543, 65 S.Ct. at 1375.

This passage reveals that *Hill* v. *Florida* should be considered in light of the unique posture of that case. In our own case, neither the union nor its officers have been enjoined from any of their activities. During the pendency of this litigation, and during the pendency of the hearings which they seek to have enjoined, plaintiffs will continue to represent casino employees and others, operating as they have in the past. The significance of the difference between the situation presented here and the one presented in *Hill* v. *Florida* is borne out by *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945), decided on the same day as *Hill*. In that case a similar statute was challenged by persons who had neither registered nor been enjoined. The Court declined to rule on the constitutionality of the statute there in question, saying:

> . . . [W]e cannot assume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file. We therefore have no question before us of a statute which has been construed to operate either by its penal sanctions or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for noncompliance

> with sec. 7 [of the state enactment]. *Compare Hill* v. *Florida*, 325 U.S. 538 [65 S.Ct. 1373, 89 L.Ed. 1782] (1945). Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that Act is applicable. . . .
>
> We can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown, *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 749 [62 S.Ct. 820, 875, 86 L.Ed. 1154] (1942); *Townsend* v. *Yeomans*, 301 U.S. 441, 454 [57 S.Ct. 842, 848, 81 L.Ed. 1210] (1937), and cases cited, and only by those who show that they are adversely affected by the alleged conflict with national power. Each of the contentions which petitioners make with respect to the conflict of sec. 7 and 16 [of the state enactment] with the National Labor Relations Act could readily be adjudicated and disposed of in an adversary suit drawing in question their validity as applied to specific states of fact, in which respondents could both challenge the facts and the applicability to them of the statute.

Id., at 466, 65 S.Ct. at 1392 (citations recast). Our case is similar to *Alabama State Federation of Labor* v. *McAdory*, *supra*, because there is considerable doubt as to whether plaintiffs will ever be enjoined from or otherwise interfered with in carrying out their union functions. The inquiry into the qualifications of the union and its leaders may not be considered to visit irreparable harm on the plaintiffs; something further must befall them before preemption may be found.

It has been held many times that Congressional intent to preempt state laws is not to be readily or incautiously inferred. *E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973). Further, we are not to "seek our conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 446, 80 S.Ct. 813, 817, 4 L.Ed.2d 852 (1960). *See also Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 127, 98 S.Ct. 2207, 2214, 57 L.Ed.2d 91 (1978); *Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45, 86 S.Ct. 1254, 1261, 16 L.Ed.2d 336 (1966). This much is clear from *Alabama State Federation of Labor* v. *McAdory, supra,* as well. There is presently no interference with plaintiffs' ability to function as a labor union or as its president. Nor will there be any such interference during the pendency of the hearing scheduled by the Casino Control Commission. Our examination of the Casino Control Act shows that actual interference with the purposes of the federal enactments is entirely avoidable.

The Commission may find, after a hearing, that the officers of Local 54 meet the qualifications established by § 86, and that the union will not be placed under the restrictions which may be imposed by section 93. Alternatively, the Commission may decide to permit Local 54's agents to collect dues and administer pension funds even though some of Local 54's personnel do not meet the qualifications established by § 86. Section 93 specifically provides:

> The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat.Ann. § 5:12-93 b (West Supp.1981). It is reasonable to assume that the Commission would exercise the discretion granted by this provision if it were presented with a situation where the imposition of the sanctions provided for in § 93 would create a conflict with federal legislation. Not only is it clear that the Commission may waive the disqualifications of § 86, it is also evident that the Commission may fashion a sanction which is of lesser magnitude than those explicitly provided for in § 93. In *Bally Manufacturing Corp.* v. *Casino Control Commission,* 534 F.Supp. 1213 (D.N.J.1982), this court was presented with a case in which the Casino Control Commission granted a license to a corporation conditioned on severance of all relationships between the corporation and one of its officers. *Id.,* at 1215. The question of whether the Commission might permissibly fashion a similar order after the hearing on Local 54's application is not before us.

With these considerations in mind, it is easy to see how this case falls squarely within the holding of *Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed. 2d 336 (1966). In that case appellants were challenging the constitutionality of a New York law dealing with the control of liquor prices. Appellants argued that meeting the requirements established by the New York law would have required them to violate federal antitrust laws. The Court rejected this argument, taking note of a section of the New York law which gave the state administrator discretion to modify the requirements complained of. The section provided that liquor could not be sold "except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. . . ." *Quoted,* 384 U.S., at 46

n.16, 86 S.Ct. at 1261-62 n.16. The Court stated: "We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the [state enactment] chafe against the Robinson-Patman Act or any other federal statute." *Id.*, at 46, 86 S.Ct. at 1261-62. In the face of a similar kind of discretion granted to the Casino Control Commission by § 93 b, we cannot depart from this holding. We are required to presume that the Commission will exercise its discretion appropriately.

Plaintiffs have maintained that there is no room for discretion in this case. They argue that because the selection of collective bargaining agents through elections is an activity protected by § 7 of the Wagner Act, *supra*, the case falls within *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), where it was held:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the NLRA, or constitute an unfair labor practice under § 8, due regard for the federal enactment required that state jurisdiction must yield. . . .

Id., at 244, 79 S.Ct. at 779.

The *Garmon* rule is not pertinent to this motion for two reasons. First, *Garmon* does not overrule *Hill* v. *Florida, supra*, and *Alabama State Federation of Labor, supra*, to the extent that they require a holding of preemption to be based on actual and substantial interference with the federal program by the state. Secondly, this court is convinced that our case falls within the line of cases where a less strict approach to pre-

emption than that in *Garmon* is taken. In *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), the Court discussed its historical recognition of exceptions to the *Garmon* rule in appropriate cases:

> We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of the power to act."

Id., at 296-97, 97 S.Ct. at 1061-62. (citation omitted). See also *Sears, Roebuck & Co.* v. *San Diego District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

We need not question at this juncture that the regulation of gambling is a matter "deeply rooted in local feeling and responsibility." *Farmer* v. *Carpenters, supra,* 430 U.S. at 296, 97 S.Ct. at 1061. We have already discussed the historical reasons why gambling has been considered anathema in the overwhelming majority of jurisdictions unless it has been subject to strict control. The case of *United States* v. *Dixon,* 25 F.Cas. 872 (C.C.D.C. 1830), discusses extensively the historical background whereby gambling was enjoinable at equity under the doctrine of nuisance. *See generally, The Development of the Law of Gambling: 1776-1976, supra.*

[7] It is important to note that in the cases which have allowed room for regulation of activities "deeply

rooted in local feeling and responsibility," there has always been an analysis of whether the state has tailored its regulations so as to show a due regard for the federal interests in activities sanctioned by the labor legislation. In *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), the Court held that a cause of action under state law could be stated for a libelous statement made in the course of an organizational campaign. The Court there adopted the standards set forth in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to such libel actions, however, in order to minimize the possibility that the threat of such suits would inhibit free discussion during labor disputes. *Linn* v. *Plant Guard Workers, supra,* 383 U.S. at 64-65, 86 S.Ct. at 665. In *Farmer* v. *Carpenters, supra,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 the Court examined whether the state court had minimized the potential for interference with the federal scheme of labor regulation during the course of an action for intentional infliction of emotional distress. It is reasonable to assume that if the Commission is faced with the possibility of sanctioning conduct of the plaintiffs which may have been protected by the National Labor Relations Act or by the LMRDA, it will engage in similar consideration in order to avoid needless friction between the state and federal programs. We are not at liberty to say that they will not do so. Accordingly, we must hold that the plaintiffs' claim of likelihood of success on the merits and irreparable harm *pendente lite* are speculative.

We may not find that there is irreparable harm simply because the hearings might lead to bad publicity about the union and its leaders, as they argue. In the case of *Cab Operating Corp.* v. *City of New York,*

243 F.Supp. 550 (S.D.N.Y.1965), it was held that irreparable harm could be found where a representation election required by a municipal ordinance would interfere with a later federally sanctioned representation election. It was said in that case that the publication of the results of the first election would likely affect the outcome of the second election. It has not been shown that an election involving Local 54 is impending in the immediate future, and we do not decide whether *Cab Operating Corp., supra,* would be applicable here if such an election were so scheduled.

This court's consideration of the public interest and the potentiality of harm to the defendants were a preliminary injunction to be issued leads the court to conclude that the plaintiffs' motion should not be granted on the basis of plaintiffs' claim that the state enactment is preempted by the labor legislation of Congress. It would be better to permit the regulatory mechanism to run its course, with the defendants left to their effort to apply the statute in a constitutionally permissible manner as they see fit.

A word on abstention is appropriate. The central issue of this motion is whether the plaintiffs are subject to the registration and hearing requirements of § 93 of the Casino Control Act. The question of the permissibility of the various sanctions and qualifications which might in the future be applied to the plaintiffs is not squarely at issue. The Casino Control Act clearly states that "[e]ach labor organization . . . *shall* register with the commission annually." N.J.Stat.Ann. § 5:12-93 a (emphasis added). The chances that a state court would interpret this dictate so as to exempt the plaintiffs as a matter of state law from the registration require-

ment appear to be slight or nonexistent. It has not been argued that there is any chance that the state courts might construe the statute so as to avoid the need for this court to decide whether the plaintiffs must be the subject of a hearing. When "the statute is obviously applicable to the plaintiff and his course of conduct or when the statute is not susceptible to a construction that will otherwise avoid the necessity of deciding a constitutional question, a federal court may not properly stay its hand." *United Steelworkers of America, AFL-CIO* v. *Bagwell,* 383 F.2d 492, 495 (4th Cir. 1967) (footnote omitted). For this reason, abstention is inappropriate.

B. *Preemption of the Casino Control Act by the Employee Retirement Income Security Act of 1974*

Plaintiffs' next asserted ground for the issuance of a preliminary injunction is that the Casino Control Act is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S. C.A. §§ 1001 *et seq.* (West 1975). ERISA was enacted to protect individual pension rights, and to establish a federal scheme for regulation of the private pension system. See H.R.Rep. No. 93-533, 93d Cong., 2d Sess. 1-5, Oct. 2, 1973, *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4639-43. It has long been accepted that the establishment and administration of employee benefit plans are partly the responsibility of labor unions. *Inland Steel Company* v. *NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960, 69 S.Ct. 887, 93 L. Ed. 1112 (1949). The facts set out, *ante,* indicate that Local 54 and its president, Frank Gerace, are active in the administration of employee benefit plans for the

benefit of members of Local 54. These are benefit plans within the meaning of the definitional section of ERISA. 29 U.S.C.A. § 1002 (West 1975).

Plaintiffs argue that the Casino Control Act is preempted by ERISA because of the potential for interference with the scheme established by ERISA. First, § 93 envisions the removal of plaintiff Gerace from his position as a member of the board of directors of the funds. Second, it is argued that if the union and its agents are prohibited from collecting contributions for the benefit plan, then the plans will be unable to meet their obligations to the people who are entitled to receive benefits therefrom.

The language used by Congress to establish the preemptive effect of ERISA is more comprehenesive than Congress usually employs. Section 514 of ERISA, 29 U.S.C.A. § 1144 (West 1975), provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter [*i.e.*, 29 U.S.C.A. §§ 1001-1144] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .
>
> (b)(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.
>
> (c) For the purposes of this section: . . .
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, di-

rectly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Id.

The legislative history of the preemption provisions of ERISA is discussed at some length in *Hewlett-Packard Co.* v. *Barnes*, 425 F.Supp. 1294 (N.D.Cal.1977), *affirmed*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978), and in *Bell* v. *Employee Security Benefit Association*, 437 F.Supp. 382 (D.Kan.1977). These cases indicate that § 514 should be broadly construed. Along with this provision, we must also take note of § 411 of ERISA, 29 U.S.C.A., § 1111 (West 1975), which, similarly to § 504 of the LMRDA, discussed above, prohibits any person convicted or imprisoned from serving as "an administrator, fiduciary, officer, trustee, custodian, agent, or employee of any employee benefit plan," 29 U.S.C. § 1111 (a)(1) (West 1975), for five years after the conviction or imprisonment. ERISA contains no provisions similar to § 603 of the LMRDA, 20 U.S.C.A. § 523 (West 1975), which is quoted in part in the portion of *DeVeau* v. *Braisted* set out *ante*, at pp. 327-328.

Although the language of § 514 of ERISA is broad, we cannot say that it warrants a holding that the application of the Casino Control Act in the case at hand is preempted by ERISA. The language does not call for the courts to invalidate a state law every time its potential application raises the mere spectre of intereference with ERISA's scheme. The outer bounds of the preemptive effect of ERISA have not been determined, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525, 101 S.Ct. 1895, 1907, 68 L.Ed.2d 402 (1981), nor should they be in the context of this motion. Section 514 does not give us leave to depart

from the well established rules counseling restraint in finding preemption in the absence of a pressing and unavoidable conflict between the state and federal program. *Alessi* v. *Raybestos-Manhattan, Inc., supra,* at 521-22, 101 S.Ct. at 1905-06.

[8] It has already been explained why the discretion which is supplied to the Casino Control Commission by the Act will give the Commission the flexibility required to avoid any conflict with the objectives of Congressional labor legislation. The same considerations dictate the denial of preliminary relief on the basis of plaintiffs' claim that the Casino Control Act is preempted by ERISA.

C. *First Amendment, Vagueness and Overbreadth*

Plaintiffs advance two arguments to support their claim that application of the Casino Control Act to them would violate the First Amendment and the Due Process clause of the Fourteenth Amendment. The first argument deals with the portion of § 93 which may be used to prevent the collection of union dues. It is stated that the application of this provision would restrain the freedom guaranteed to workers to join together in a union and to advance collectively their cause. The second argument is aimed at those portions of § 86 which permit the Casino Control Commission to pass on the quality, nature and purposes of the plaintiffs' associations. It is said that the language of § 86 gives too much discretion to the Commission, is too broadly and vaguely worded to withstand constitutional scrutiny, and thereby inhibits the rights of plaintiffs and others to engage in associational activity protected by the First Amendment. It is further argued that § 86 is so vaguely worded that it fails to give notice of what sort of actions

may be punishable, and for that reason its application would violate due process.

[9-11] We may not abstain on these questions for two reasons. First abstention has been held to be particularly inappropriate where the plaintiff has alleged that the statute sought to be enjoined inhibits the exercise of First Amendment freedoms. *Cameron* v. *Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Zwickler* v. *Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). These rights, if actually inhibited, are too important to permit any delay and additional cost to be imposed by deferring their vindication to another forum. Secondly, there are cases where the challenge to the statute is so insubstantial that the court may conclude that none of the purposes of *Pullman* abstention would be served by forcing the litigants to settle their claims in state court. In cases where the challenge to the state statute is destined to fail, it is unnecessary to have the state courts set forth their construction of the statute so that the federal constitutional issues might be mooted or presented in a new light. *See International Longshoremen's Association* v. *Waterfront Commission,* 495 F.Supp. 1101, 1114 (S.D. N.Y.1980), *affirmed in part,* 642 F.2d 666 (2nd Cir. 1981). For the reasons explained below, this is such a case.

It has already been stated that the challenge to the statute is at this point a facial one, based on the assertion that §§ 93 and 86 are invalid in their application to labor unions under any circumstances. Were the court presented with a challenge to a specific application of these provisions, the question of whether to abstain might be differently decided. Additionally, our decision not to abtain does not prevent the state courts from construing the

Casino Control Act in as narrow a fashion as they may see fit, *International Longshoremen's Association* v. *Waterfront Commission, supra,* 495 F.Supp. 1101, 1114, or from deciding that the Constitution of New Jersey, *e.g.,* N.J. Stat.Ann.Const. Art. 1, § 6 (liberty of speech) (West 1971); N.J.Stat.Ann.Const. Art 1, § 19 (West 1971) (right to organize and bargain collectively), prevents the Act from being enforceable against labor unions and their members.

[12-14] The First Amendment's protection of freedom of association extends to labor union activities, such as the right to solicit union membership, and to join for the purposes of redress in the grievances of union members. *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed. 2d 426 (1967); *Staub* v. *City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). It is obvious that money is required to enable the effective exercise of First Amendment rights, *e.g., Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and the effective functioning of any union. *Abood* v. *Detroit Board of Education,* 431 U.S. 209, 221, 97 S.Ct. 1782, 1792, 52 L.Ed.2d 261 (1977). The prohibition of collection of dues would be nearly as effective a ban on the union's First Amendment activities as would a more direct prohibition against such activities. *International Longshoremen's Association* v. *Waterfront Commission,* 495 F.Supp. 1101, 1132-33 (S.D. N.Y.1980), *affirmed in part,* 642 F.2d 666 (2nd Cir. 1981); *United Mine Workers of America, District 12, supra,* 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967). The Casino Control Act's grant of power to prohibit the collection of union dues must be subject to the same kind of constitutional scrutiny as a direct ban on the union's activities.

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This case does not involve a prior restraint on the exercise of First Amendment freedoms such as was forbidden in *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), and *Lovell* v. *Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). The collection of dues which plaintiffs fear may soon be forbidden has continued unencumbered to this day, and will no doubt go on during the pendency of any hearing. It is only after certain findings of fact are made by the Commission that the restraint on dues collection may be imposed. This much has been provided for in § 93. More fundamental to our inquiry is the issue of whether the Casino Control Act grants to the Commission the kind of broad discretion—unbridled by any standards to guide enforcement—which has led to invalidation of state statutes which attempt to subject the exercise of First Amendment activities to licensing requirements. *E.g., Schneider* v. *State,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Lovell* v. *Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). The question of whether there are sufficiently defined standards to guide the Commission in enforcing § 93 involves the questions of overbreadth and vagueness. If § 86 gives insufficient guides for the enforcement of § 93, then the Casino Control Act may not permissibly be applied to prevent the collection of union dues. Therefore, examination of § 86 to determine if it is overbroad or vague is in order.

1. *Overbreadth*

[15] The overbreadth doctrine which plaintiffs seek to have applied on this motion is a rule which permits parties in cases involving challenges to government restric-

tions of First Amendment freedoms to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the court. *Village of Hoffman Estates* v. *Flipside, Inc.*, —— U.S. ——, ——, 102 S.Ct. 1186, 1197, 71 L.Ed.2d 362 (1982) (White, J., concurring); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 2915-17, 37 L.Ed.2d 830 (1973). The effort to apply the doctrine is particularly appropriate here, because no sanctions have been applied to plaintiffs for any of their conduct—whether protected by the First Amendment or otherwise. It is only possible for this court to inquire into whether the statute "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman, supra*, —— U.S. ——, 102 S.Ct. 1186, 1189-90.

[16] The plaintiffs have argued that § 86 permits too broad an inquiry into the associational activities of registrants and applicants for licenses. We may assume for the purposes of this argument, that the First Amendment guarantees to the individual citizen the right to associate for political and social purposes, so long as there is not some showing that the association is for some purpose which endangers the public welfare. *United States* v. *Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). It has also been held that a governmental inquiry into all of the associations of government workers, without any explicit limitations on how these associations might be weighed in considering the qualifications of the workers, impermissibly inhibits those workers in the exercise of their associational freedoms. *Shelton* v. *Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

The Casino Control Act does not provide any warrant to the Commission to take the sort of blunderbuss approach condemned in *Shelton* v. *Tucker, supra*. Section 86 does

not call for an inquiry into every political and social association of an applicant. The only sort of association which might lead to disqualification under the Casino Control Act is set forth in § 86 f, which allows sanctions when an applicant has been identified as an "associate of a career offender or a career offender cartel in . . . a manner which creates a reasonable belief that the association is . . . inimical to the policy of this act and to gaming operations." N.J. Stat.Ann. § 5:12-86 f (West Supp.1981). The provision goes on to state that a career offender, roughly, is one who has made an occupation of violating the public policy of the state in a criminal manner for economic gain. *Id.*

Section 86 is aimed primarily at illegal activities for profit. The overbreadth doctrine does not apply to commercial transactions, *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 447 U.S. 557, 565, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co.* v. *Human Relations Commission,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973), primarily because it is believed that those who profit through the exercise of their First Amendment freedoms need not rely on others to assert their rights vicariously. To the extent that the associations burdened are for the purpose of violating criminal laws, there is no need to question that such associations may be outlawed altogether.

[17] The likelihood that § 86 f will inhibit associational activities other than those just described is minimal. It is not aimed primarily at non-criminal, non-economic associations, and for this reason, we reject plaintiffs' overbreadth claim. The statute does not reach so far into the realm of protected activities as to call for its facial invalidation. *Broadrick* v. *Oklahoma, supra.*

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2. *Vagueness*

[18-20] The final ground asserted by plaintiffs on this motion for preliminary relief is that the statute is impermissibly vague. A statute is void for vagueness when its words fail to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . . ." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); *see also United States* v. *Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). When a penal provision is not ". . . sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties, . . ." *Connally* v. *General Construction Company,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), there is a denial of the due process required by the Fourteenth Amendment. *Lanzetta* v. *New Jersey, supra,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888. Explicit standards of conduct are also required in order to protect against arbitrary enforcement. *Papachristou, supra.*

The vagueness doctrine was recently expounded in *Village of Hoffman Estates* v. *Flipside, Inc. supra,* —— U.S. at —— - ——, 102 S.Ct. at 1193. There the Court quoted from *Grayned* v. *City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what

is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory applications." (footnotes omitted).

Id.

The Court continued:

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject-matter is often more narrow, . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of

> free speech or of association, a more stringent vagueness test should apply.

Village of Hoffman Estates, supra, —— U.S. at —— - ——, 102 S.Ct. at 1193-94 (footnotes omitted).

These considerations must inform our inquiry into whether the standards enunciated by § 86 are too vague ever to be applied fairly to any citizen.[4] The first consideration is that the allegedly vague portions of § 86 are aimed primarily at economic activities. This is clear from our overbreadth analysis of § 86 f, which is similar to the challenged portions of § 86 e. Secondly, the penalties which the Act imposes are civil rather than criminal.

[21] Before turning to the other considerations enumerated in *Village of Hoffman Estates, supra,* we note that §§ 86 e and 86 f provide that activities may provide grounds for sanctions only if they create a "reasonable belief" that the conduct in question would reflect poorly on the applicant's qualifications for licensure. *Id.* Our attention has been drawn to the Commission's opinion in the matter of the *Application of Resorts International Hotel, Inc. for a Casino License,* Docket No. 79-CL-1 (undated) (Defendants' Exhibit 6), from which it is clear that the actions of an applicant are judged by the ethical and legal standards which were prevailing at the time and place of the actions in question.

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[4] The Court stated in *Village of Hoffman Estates* that to succeed on a vagueness claim, ". . . the complainant must demonstrate that the law is impermissibly vague in *all* of its applications." *Id.,* —— U.S. at ——, 102 S. Ct. at 1191 (emphasis supplied).

Id., at 34, 43, 53, 84.[5] This interpretation of § 86 is consistent with "reasonable belief" requirement, inasmuch as it establishes an objective standard for judging an applicant's actions. With the case at bar, we may compare *Coates* v. *City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), where the Court declared that an ordinance could not constitutionally proscribe conduct "annoying to persons passing by." It was held that the "annoying" standard could not be fairly applied because, "Conduct that annoys some people does not annoy others." *Id.*, at 614, 91 S.Ct. at 1688. This subjective standard differs greatly from the objective standard which is preserved here.

The application of the objective standard serves many of the same purposes as would a scienter requirement, in that it includes an element of notice to the potential applicant. Conduct which a reasonable person does not expect to provide grounds for suspicion, and which does not violate contemporary legal and ethical standards, would not likely result in disqualification for that person. The objective standard also minimizes the opportunities for arbitrary enforcement, one of the most important problems with laws which have been found vague. Further, the provision requiring the Commission to prepare specific findings of fact and to state the reasons for denying any applications also reduces the danger that there will be arbitrary enforcement. N.J. Stat.Ann. § 5:12-94 c (West Supp.1981).

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[5] In determining the meaning of the Casino Control Act, this court should consider the interpretation of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 2300, 33 L. Ed. 2d 222 (1972).

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The most crucial question raised in deciding whether a statute is impermissibly vague is whether it inhibits the exercise of First Amendment freedoms. It has already been indicated in our analysis of the overbreadth issue that the Casino Control Act it not aimed substantially at protected associations.

In view of all of these considerations, the court concludes that plaintiffs are not likely to succeed on the merits of their vagueness claim. Nor are they likely to succeed on the merits of their related overbreadth and First Amendment claims. The absence of any irreparable harm *pendente lite* has already been discussed in connection with the discussion of plaintiffs' preemption claims, as has the conclusion that the balance of equities and the public interest weigh against the issuance of a preliminary injunction.

V. CONCLUSION

For the reasons set forth herein, an order denying plaintiffs' application for a preliminary injunction will be entered.

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ON MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

Hotel and Restaurant Employees and Bartenders International Union Local 54 (hereinafter "Local 54"), and its president, Frank Gerace, filed this action seeking a declaration that certain provisions of New Jersey's Casino Control Act, L.1977, c. 110, § 1 *et seq.*, as amended by L.1978, c. 7, § 1 *et seq.*, N.J.Stat.Ann. § 5:12-1 *et seq.* (West Supp. 1981), may not constitutionally be enforced against them. Plaintiffs also seek relief in the form of damages and an injunction. Plaintiffs have invoked 28 U.S.C.A. §§ 1331, 1337, 1343 (West Supp.1981) as sources of this court's jurisdiction. Plaintiffs sought to have this court enjoin hearings scheduled by the defendant Casino Control Commission *pendente lite*, and the court denied plaintiffs' motion for preliminary injunction on March 22, 1982. (*See* Opinion and Order, March 22, 1982).

The matter is currently before the court on the motion of plaintiffs for a temporary injunction pending appeal, which the court has authority to grant under Rule 62(c), Fed.R.Civ.P. That rule reads in part: "When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms . . . as it considers proper for the security of the rights of the adverse party." *Id.* Plaintiffs have filed a notice of appeal from the decision of March 22, 1982, purportedly under the provisions of 28 U.S.C.A. § 1292(a) (West 1966). The court has been informed that the defendant Casino Control Commission has scheduled hearings pursuant to § 93 of the Casino Control Act. N.J.Stat.Ann. 5:12-93 (West Supp. 1981), to begin on April 26, 1982.

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[22] On a motion for an injunction authorized by Rule 62, Fed.R.Civ.P., it is well established that the court must evaluate the extent to which the moving party has made a showing as to the following four factors:

(1) the likelihood of the moving party's success on the merits of its appeal;

(2) the likelihood of irreparable injury to the moving party if the injunction is denied;

(3) the extent to which the opposing parties will be harmed if the injunction sought is issued; and

(4) the likelihood that there will be no substantial harm to the public interest if the injunction sought is issued.

Long v. *Robinson*, 432 F.2d 977 (4th Cir. 1970); *Philadelphia Council of Neighborhood Organizations* v. *Adams*, 451 F.Supp. 114 (E.D.Pa.1978); *Evans* v. *Buchanan*, 435 F. Supp. 832 (D.Del.1977); *Resident Advisory Board* v. *Rizzo*, 429 F.Supp. 222 (E.D.Pa.1977). Of course, no single factor is controlling, and the court must balance the strength of the plaintiffs' showing on each of these four factors as part of its exericse of discretion in considering the motion. *Phila. Council of Neighborhood Organizations, supra*, 451 F.Supp., at 116, citing, *Evans* v. *Buchanan*, 424 F.Supp. 875, 879 (D.Del.1976). The court will discuss each of these four factors below.

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I. LIKELIHOOD OF SUCCESS ON THE MERITS OF THE APPEAL

Plaintiffs have not filed a motion for reconsideration, nor have they treated the instant motion as one. It has been recognized that there is an almost insurmountable burden in requiring a party to satisfy a court that its decision on a matter which it has considered extensively was erroneous. Yet, this is what is required if a party is to show the court that it is likely to succeed on appeal. *See Evans* v. *Buchanan*, 435 F.Supp. 832, 835, 843 (D.Del.1977). The court does not take plaintiffs' efforts to show this court that it was in error as an affront. Nevertheless, the court feels that the arguments are best left unanswered when the other factors which the court is required to consider can determine the outcome of the motion. Plaintiffs stated at oral argument that the posture of the instant case is different from that of a case on which the court is said to have placed "primary reliance." The court feels that the opinion of March 22 should speak for itself, and that it should not indulge in discussions of which precedents were more persuasive than others if such discussion is not necessary. For this reason, the court will turn to the other factors which plaintiffs are required to show.

II. IRREPARABLE HARM

The court is not satisfied that plaintiffs will suffer irreparable harm during the pendency of the appeal if the Casino Control Commission's hearings are not enjoined. Plaintiff argues that the publicity which will likely result from the hearings which are scheduled to begin on April 26 will have an impact on the elections scheduled for June,

1982, in which the members of plaintiff Local 54 will choose their leaders. Reference by plaintiffs is made to page 332 of the opinion of March 22, where it was stated:

> We may not find that there is irreparable harm simply because the hearings might lead to bad publicity about the union and its leaders, as they argue. In the case of *Cab Operating Corp.* v. *City of New York*, 243 F.Supp. 550 (S.D.N.Y.1965), it was held that irreparable harm could be found where a representation election required by a municipal ordinance would interfere with a later federally sanctioned representation election. It was said in that case that the publication of the results of the first election would likely affect the outcome of the second election. It has not been shown that an election involving Local 54 is impending in the immediate future, and we do not decide whether *Cab Operating Corp., supra*, would be applicable here if such an election were so scheduled.

In *Cab Operating Corp., supra*, the court enjoined the release of the results of a municipally sanctioned election for union representation where a federally sanctioned election was likely to follow closely on its heels under different conditions and rules. It was held that these circumstances brought the case within those which prohibited ". . . activities of officers or bodies purporting to act under the sanction of state or local law to coerce parties to a controversy or to force its resolution through the pressure of molded public opinion in derogation of federally granted rights." *Id.*, at 556 (citations omitted). It is clear that the Casino Control Commission's hearings do not rise to the level of direct interference with federally sanctioned activities which was present in the *Cab Operating Corp.* case.

Nor do the state's activities sink to the nadir of illegitimacy which the court faced in that case. Publicity about union activities is a product of a free and vigorous press, and so long as it is not engineered by state action for the purpose of undermining federally sanctioned activities, the court is not free to interfere.

Plaintiffs also assert that irreparable harm will befall them if an injunction is not entered because certain of the issues which they raised in their motion for a preliminary injunction may be mooted during the pendency of their appeal. In their brief, at page 9, it is stated:

> This entire case and the issues on Appeal revolve around proposed state activity which is now threatened to occur in its entirety pending appeal. There can be little doubt that the Commission hearings will be held in full before the merits of the Plaintiffs' Appeal are finally determined by the Third Circuit. Given that the focus of the Plaintiffs' Appeal is to obtain an injunction of the Commission hearings, if the hearings are allowed to run their course pending Appeal, the practical import of the relief sought by the Plaintiffs will be mooted. If the Plaintiffs are victorious on Appeal, such a victory will be academic. Accordingly, for this reason it is further appropriate to grant interim relief. *J. Weingarten, Inc.* v. *Potter,* 233 F.Supp. 833 (S.D.Tex. 1964).

Plaintiffs have informed this court that they have moved or will soon move for an expedited determination of their appeal. The question of whether the appeal may be determined before the Casino Control Commission takes any action which might render moot some of the issues raised

by plaintiffs is solely within the control of the appellate panel. Any determination of this question by this court would be based on nothing more than mere speculation.

III. HARM TO THE DEFENDANTS AND TO THE PUBLIC INTEREST

This court is required to consider the extent to which an injunction might harm the interests of the defendants and of the public. Consideration of these factors on the motion for a preliminary injunction led this court to the conclusion that the state's regulatory mechanism should be allowed "to run its course, with the defendants left to their effort to apply the statute in a constitutionally permissible manner as they see fit." Opinion of March 22, at page 332. The court is reaching the same conclusion on the instant motion.

IV. CONCLUSION

For the reasons stated above, the plaintiffs' motion for an injunction pending appeal will be denied. The court will enter an appropriate order.

APPENDIX C

Order of United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

for the District of New Jersey

Civ. A. No. 81-2630

October 1, 1982

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*

v.

MARTIN DANZINGER, *et al.*

ORDER

Upon motion made and for good cause shown, it is hereby ordered and decreed that Defendants, Division of Gaming Enforcement and Casino Control Commission are hereby enjoined pending appeal from taking any steps to enforce Section 93 of the New Jersey Casino Control Act against Plaintiff, Hotel and Restaurant Employees and Bartenders International Union Local 54, its officers, agents, employees and members. Defendants are further

enjoined pending appeal from taking any steps to enforce the decision rendered by the Commission in that matter docketed as *In Re the Registration of Hotel and Restaurant Employees and Bartenders International Union Local 54,* 81-LO-1, entered September 28, 1982;

Provided, defendants are not enjoined from rendering an opinion and order respecting the interpretation of § 93(b) of the Casino Control Act with respect to administration of pension and welfare funds.

STANLEY S. BROTMAN
United Sstates District Judge

Dated: October 1, 1982

Original Filed
October 1, 1982
Allyn Z. Lite, Clerk

APPENDIX D

Opinion of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

September 28, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54

NEW JERSEY CASINO CONTROL COMMISSION:

Don M. Thomas, Acting Chairman
Martin B. Danziger, Commissioner
Joel R. Jacobson, Commissioner
Madeline H. McWhinney, Commissioner
Carl Zeitz, Commissioner

APPEARANCES:

For the Casino Control Commission:
John R. Zimmerman, Senior Assistant Counsel
Timothy J. O'Neill, Assistant Counsel

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For the Division of Gaming Enforcement:

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For Frank Gerace:

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Duane Morris, Heckscher, Esq.

On May 11, 1981, the Division of Gaming Enforcement (Division) filed a letter report with this Commission in which it alleged that three officials of Hotel and Restaurant Workers and Bartenders International Union Local 54 were disqualified under section 86 of the Casino Control Act, N.J.S.A. 5:12-86. The Division therefore urged the Commission to impose the sanctions provided by section 93 of the Act, N.J.S.A. 5:12-93, against Local 54. The Commission scheduled a hearing. Local 54 then filed suit in the Federal District Court for the District of New Jersey seeking, *inter alia*, to enjoin the enforcement of sections 86 and 93 of the Act against it. *See, Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger* (sic), *et al.*, 536 F. Supp. 317 (D. N. J. 1982). At the request of the Court the Commission adjourned the hearing pending disposition of

Local 54's motion for a preliminary injunction. Following the denial of that motion, the hearing before the Commission was again scheduled. On April 30, 1982, prior to the commencement of the hearing, the Division filed a second letter report in which it cited two additional employees of Local 54 as suffering from section 86 disqualification and again urged that the section 93 sanctions be imposed against the Union. The Commission thereafter held the hearing, during which it considered the issues raised in both the May 11, 1981, and April 30, 1982, letter reports.

Before proceeding to the resolution of those issues, we will briefly describe the statutory provisions involved. Section 93 of the Act provides that a labor union which seeks to represent persons licensed or registered under the Act and employed at a casino hotel must register annually with the Commission. N.J.S.A. 5:12-93(a). Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 also empowers the Commission to preclude any union which is required to register from receiving dues from any persons licensed or registered under the Act and employed in a casino hotel, and from administering pension or welfare funds, if any officer, agent or principal employee of the union is disqualified under section 86, unless the Commission waives the disqualification "consistent with the public policy of this act and upon a finding that the interests of justice so require." N.J.S.A. 5:12-93(b).

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Section 86 of the Act enumerates various disqalifying criteria, which apply not only to officers, agents and principal employees of labor unions, but also to all persons who must be licensed or registered in connection with the ownership, financing, management and operation of casinos and casino hotels. Only two of the section 86 criteria are relevant to the present case. Section 86(c) disqualifies persons convicted of certain enumerated crimes under New Jersey law or of any equivalent offenses in any other jurisdiction. N.J.S.A. 5:12-86(c). Section 86(f) provides for the disqualification of any person who is "an associate of a career offender or a member of a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations." N.J. S.A. 5:12-86(f). This section defines a career offender as "any person whose behavior is pursued in an occpational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this state," and defines a career offender cartel as "any group of persons who operate together as career offenders."

In its initial letter report of May 11, 1981, the Division alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its Executive Board, Frank Materio, were disqualified under section 86(c) by reason of criminal convictions, and that Lumio, Materio and the Union's president, Frank Gerace, were disqualified under section 86(f) by reason of their association with certain career offenders or career offender cartel members. Robert Lumio died prior to the hearing before the Commission, and thus his qualifications were no longer in issue. During the hearing it was established that

the statute under which Frank Materio was convicted was later declared unconstitutional and that he had been granted a presidential pardon. The Commission therefore ruled that it would not find Materio disqualified under section 86(c) based on this conviction.

Thus, with respect to Gerace and Materio, the questions which remain for consideration are (1) whether they are associated with a career offender or a career offender cartel member, and, if so, (2) whether the association is of such a nature as to create a reasonable belief that it is inimical to the policy of the Act and to gaming operations.

In its second letter report, dated April 30, 1982, the Division alleged that two Union employees, Eli Kirkland and Karlos LaSane, had been convicted of crimes enumerated in section 86(c). During their testimony Kirkland and LaSane described themselves as "business agents" and "organizers" for the Union (T248; T287; D1; D8), and the Union contended that they are not officers, agents or principal employees within the meaning of section 93. Kirkland and LaSane admitted to their convictions, and certified copies of the convictions were accepted into evidence. It is clear that some of the crimes involved are among those enumerated in section 86(c). However, the Union urged the Commission to waive the section 86(c) disqualification of Kirkland and LaSane and presented evidence of their rehabilitation and of their value to the Union's membership and the community at large. Thus, with respect to these individuals, the issues before us are (1) whether they are officers, agents or principal employees of Local 54, and, if so, (2) whether the Commission should waive their section 86(c) disqualification consistent with

the policy of the Act and in the interests of justice as permitted by section 93(b).

Prior to the hearing the Commission ruled that the burden of proof of section 86 disqualification was on the Division. The quantum of proof required is a preponderance of the evidence. *In the Matter of the Application of Resorts International for a Casino License,* Docket No. 79-CL-1 (1979), at 12. In determining whether the Division has met its burden we will first deal with the evidence against Gerace and Materio and then turn our attention to Kirkland and LaSane.

GERACE AND MATERIO

I. ORGANIZED CRIME

The Division alleges that Gerace and Materio are associated with career offenders or members of a career offender cartel, and thus it has the burden of establishing the identity of the career offenders and the existence of a career offender cartel.

The Division presented extensive evidence designed to prove that certain persons are career offenders or career offender cartel members. Counsel for Local 54 and Gerace, who was separately represented, repeatedly indicated that they had no intention of litigating the point (*see, e.g.,* T455; Brief at 15).[1] However, during summations counsel for Local 54 questioned whether the

[1] T refers to the transcript. D refers to the Division's exhibits. R refers to Local 54's exhibits. C refers to the Commission's exhibits.

Division had met its burden on this threshold issue (T2464). We find that it has.

There was substantial evidence adduced during the course of the hearing regarding the existence and structure of organized crime in the Philadelphia metropolitan area and the southern portion of New Jersey, including Atlantic City. Much of this evidence was introduced through the testimony of John Tamm and James Maher, special agents with the Federal Bureau of Investigation, and Gino Lazzari, an agent with the Pennsylvania Crime Commission, all of whom have extensive experience in investigating organized crime (T429; 1002-1003; 1268). They indicated that their familiarity with the structure of organized crime and the individuals involved therein was based upon their own investigations, intra-agency communications, contacts with other law enforcement agencies, conversations with confidential informants, authorized wiretaps and discussions with purported members of organized crime (T440; 462; 481; 1003; 1014).

These witnesses described an organization of men who routinely engage in a variety of illegal activities including gambling, loansharking, labor racketeering, extortion, murder, arson, pornography and narcotics trafficking (T430; 452; 1015).

This organization is referred to by its members as La Cosa Nostra which, roughly translated, means "this thing of ours" (T429). La Cosa Nostra consists of a number of groups commonly called "families," which are generally identified by the name of a significant figure in that family (T451). Generally, each family limits its activities to a particular geographic area (T 442). Furthermore, each family adheres to a basic hier-

archical structure. The boss is the head of the family (1006), and the underboss is the second in command (T449; 1007). The consiglieri or counsellor advises the boss and assists him in resolving intra-family disputes (T449; 1007; D54, at 62-64). Beneath the family leadership are units known a regimes which are headed by a capo (T450; 1007). Each regime consists of initiated members of the organization called soldiers (T450; 1007).

The primary family which operates in the Philadelphia-South Jersey area is known as the Bruno family, so named for Angelo Bruno, who reputedly headed the family for a number of years until he was murdered in March 1980 (T449; 451; D15). Following Bruno's death it was reported that his underboss, Philip Testa, assumed control of the family (T1027; D18; D54, at 34). Testa had a lengthy criminal record (D18). He was killed in a bomb blast in March 1981 (T1028).

Agents Tamm (T544) and Lazzari (T1028) testified that Nicodemo Scarfo now heads the Bruno family (*see also,* R8, at 37-38). Scarfo has a lengthy history of criminal involvement. In March 1950, he pled guilty to setting up an illegal lottery and conspiracy (D97). In Febrary 1964, he pled guilty to involuntary manslaughter after being charged with murder (D96). In June 1971, he was held in contempt for refusing to testify before the New Jersey State Commission of Investigation and was committed to Yardville Correction Center (D92). In July 1976, he was incarcerated for refusing to answer questions before a State grand jury investigating allegations of obstruction of justice in a criminal prosecution (D93). Lastly, he was convicted of possession of a firearm by a convicted felon in 1981 (D95). In sentencing Scarfo to prision for two years for this last conviction, the court concluded:

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"Mr. Scarfo is surrounded by violence" (D60, at 92, part 2).

There was evidence presented during the hearing of Scarfo's recent involvement in both loansharking and illegal gambling endeavors (T487-88; D14; D60, at 38-42 first part).

On November 4, 1977, the FBI, using a court-authorized wiretap, recorded a conversation as the Tyrone Denittis Talent Agency among Nicodemo Scarfo, Philip Testa, Harry Riccobene and Frank Narducci (T534; D54). Both Riccobene and Narducci have extensive criminal records (D21; D43) and are alleged to have been associates of Scarfo and Testa (T515; 1039). During the recorded conversation the participants referred repeatedly to "La Cosa Nostra" (D54, at 56), "boss" (D54, at 40, 43, 54), "underboss" (D54, at 34) and "consiglieri" (D54, at 35, 36, 62), and clearly indicated that they are members of the Bruno crime family.

Scarfo further evidenced his criminal nature by attempting to recruit members for his criminal group. Joseph Salerno testified to Scarfo's efforts to persuade him to become "a gangster" (T678). Salerno is presently participating in the federal witness protection program and his testimony will be discussed at considerable length below.

In December 1979, a telephone list was seized from Scarfo following his arrest for the murder of Vincent Falcone (T906-08). This list contained the telephone numbers of numerous individuals who have criminal records and have been associated with organized criminal activity (D9; D16), including Ralph Puppo (T505-506, 1029; D60, at 45-46, first part), Philip Testa (D18;

D19; D109), Lawrence Merlino (T1030), Salvatore Merlino (T1028; D59, at 15), Alfred Iezzi (A1030; D58, at 44), Nicholas Russo (T1031), Frank Narducci (T1032; D20; D21), Anthony Ferrante (D24; D25), Antonio Caponigro (T525; D31; D32; D59, at 45), Ralph Napoli (T 522-523; 1033; D29), Anthony Casella (T1035; D58, at 45), Frank Monti (A1035; D40; D58, at 48), Salvatore Testa (T1036), Salvatore Profaci (D48), Lawrence Centore (D51; D60, at 100, first part), Louis Pacella (T 527; D50) and Frank Serpico (T530; D49).

We find that Scarfo is a career offender and an active member of a career offender cartel.

Numerous other individuals were identified as being members of La Cosa Nostra or associates of Scarfo during the course of the hearing. However, we will focus specifically on only four of these men as relevant to the matter at hand.

Nicholas Virgilio has been twice convicted of murder (D117-120), and has been identified as a member of the Philadelphia-based crime family (T1039). He is a close associate of Scarfo (T943; 1225). We find that Virgilio is a career offender and a member of a career offender cartel.

Philip Leonetti who is Scarfo's nephew, was identified as a member of this crime syndicate (T676-7; 1041-42). Leonetti and Vincent Bancheri are partners in a concrete business called Scarf, Inc. (D121). Joseph Salerno testified that he was told by Bancheri that "Nick Scarfo was really the boss, but they couldn't have him in the corporation" (T667). The Scarf, Inc. office is located at 28 North Georgia Avenue, Atlantic City which adjoins 26 North Georgia Avenue, the residence of Scarfo (T675-6; D64).

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Leonetti's criminal record consists of several arrests, two of which were for murder, and a single conviction for a disorderly persons offense in 1975 (D47). Salerno testified, and we find, that Leonetti arranged a usurious loan to him using assets derived from Scarfo (T487-88; D14; D60, at 38-42 first part). We find that Philip Leonetti is closely associated with Scarfo and has engaged with him in a criminal enterprise.

Salvatore Merlino reportedly holds the position of underboss in the Bruno-Scarfo crime family (T1028). According to Salerno, Salvatore Merlino has assisted Scarfo in his illegal gambling operation (T487-488; D14; D60, at 38-42). Lawrence Merlino has been identified as an initiated member of La Cosa Nostra and a close associate of Scarfo (T700-701; 710; 949; 976; 1043). We find it unnecessary to make specific findings with regard to the Merlinos' status as career offenders or as members of a career offender cartel, although their names will come up again in this opinion.

We now turn to the more difficult issue—whether the Division has proven that Gerace and Materio are associated with a career offender or a career offender cartel member "in such a manner which creates a reasonable belief that the association is inimical to the policy of [the] act and to gaming operations" N.J.S.A. 5[redacted]6(f). In this respect the hearing focused on the relationships of Gerace and Materio to Scarfo. We now turn to the evidence concerning the existence and nature of their relationships.

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II. RELATIONSHIP OF GERACE AND MATERIO TO SCARFO

The evidence presented by the Division on this issue is diverse and does not lend itself to neat categorization, which is understandable considering the nature of the issue. We must consider each of the areas raised by the Division and the evidence adduced by all the parties to determine whether the Division has proven a section 86(f) disqualification of Gerace and Materio. We will begin with two pieces of documentary evidence taken from Scarfo when he was arrested for murder on December 23, 1979.

On December 16, 1979, Vincent Falcone was murdered. Scarfo, Leonetti and Lawrence Merlino were arrested and charged with the murder. They were tried and found not guilty.

As previously noted, at the time of Scarfo's arrest a telephone list (D16) was taken from his person (T906). A duplicate thereof was taken from a dresser drawer in his apartment at 26-28 North Georgia Avenue (T908).

Law enforcement officials determined that many of the names on the list were aliases and many of the telephone numbers were in code. After deciphering the code they determined that generally, but not invariably, the coded numbers related to associates of Scarfo or of organized crime or of organizations associated with Scarfo. Many of the uncoded numbers related to reputable persons, such as dentists and lawyers, not deemed to be associates of Scarfo (T920-922; 974; D9; D10).

There were five persons on the list who are or were employed by Local 54. Frank Gerace was listed under the name "Percy" and his telephone number was in code. Frank

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Materio was listed by his proper name and his business and home numbers were listed in an uncoded fashion. Robert Lumio, who served as secretary-treasurer of Local 54 from September 1979 until his death in June 1981, was listed as "Bob L," with an uncoded number. Frank Lentino, a business agent for Local 54 (T1665) and, since June 1981, office manager of its Camden office, was listed as "Frank Gray," with coded phone numbers for his home and a Teamsters local for which he once worked. Susan Holland, the branch manager of William L. Meyers, Inc., administrator of the health and welfare funds for Local 54, and a "collector" for the Local's severance fund (T324; 1732; 1904), was listed as "Percy girl," with a coded number. In addition, Gerace's mother, who also lives at 26-28 North Georgia Avenue, was listed as "Percy Mom," with a coded number.

It can be inferred that the persons on the list are those who Scarfo had occasion to speak with or anticipated that he might have occasion to speak with on the telephone. In view of the constant attention he receives from the police, it can further be inferred that he kept certain numbers in code because he did not want evidence of his association with those persons to fall into the hands of the authorities. The appearance of five Local 54 employees on the list is evidence of Scarfo's interest in the Union and access to its leaders, and his encoding of the Gerace and Holland entries evidences a desire to mask his association wtih them.

The other document in question is another piece of paper taken from Scarfo's dresser drawer after his arrest for the Falcone murder (D62). The writing on this paper is less than clear, but, according to the Division and according to our own reading of the exhibit, it contains the words: "KIS — POTS — GON ALL OUT BACK TO 54 ST. BE-

FORE FEB" (T936). The Division alleges that the note refers to Thomas Kissick, Ernest Potts and Thomas "Goony" Walsh, and their removal as union officials when Local 491 merged with Local 54 in September 1980.

Thomas Kissick was the head of Local 491, a bartenders local which originally merged into Local 54 (T1824) sometime around 1975 (RA, at 37). Thereafter Kissick became secretary-treasurer of Local 54 (T27). According to Warren Borish, an attorney for Local 54, as casinos became a possibility in Atlantic City Kissick petitioned the International Union to again split local 491 from Local 54 so that he could again have his own bartenders union (T1824), and in August 1979 Local 491 was in fact split from Local 54 (T1825; R8, at 42).

Kissick was appointed acting president (R8, at 42) or acting secretary-treasurer (T937) of the new Local 491. The International appointed Ernest Potts, an International trustee, and Thomas "Goony" Walsh, an International organizer, to run the day-to-day affairs of the Local (T927; 1825; 1859-1860; R8, at 42). The International also directed the creation of a joint board to oversee 491 and 54 and Gerace became the chief executive officer of that joint board (T1825-1826).

In September 1980, after one year in existence, 491 again merged into 54. According to Borish, this merger resulted from 491's inability to survive on the dues it was collecting and the desire of the International to avoid having to register under section 93 of the Casino Control Act as a result the existence of the joint board (T1826-1827). At any rate, as a consequence of the merger, Kissick, Potts and Walsh were out of their union jobs (T937).

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We find that the words on D62 refer to the ouster of Kissick, Potts and Walsh from their union positions when 491 remerged with 54. It is true that there is no indication what the letters "st." on the paper mean, and that the paper says "before feb." and the remerger and consequent removal of Kissick, Potts and Walsh did not occur until September 1980. However, the words on the paper are sufficiently clear to support the interpretation given by the Division. The fact that Scarfo had the paper in his possession indicates that he has an interest in the affairs of these unions and in keeping up to date on who is running them, and that he was supplied with advance notice of the merger of 491 and 54.

During the hearing the Division attempted to obtain a handwriting exemplar from Scarfo in order to determine if D62 is written in his hand. The Commission ordered Scarfo to produce the exemplar, and upon his failure to do so certified to the Superior Court facts underlying his contempt of the Commission. *See,* N.J.S.A. 5:12-107(c). However, we do not think it is of particular importance whether the words on the paper are in Scarfo's handwriting. The significant fact is that he had the paper in his possession.

The events surrounding the Falcone murder arrests yield still further evidence of the relationship of Gerace and Materio to Scarfo and his associates. Shortly after their arrest, Scarfo, Leonetti and Merlino were released on $92,000 cash bail (T1158). The bail was supplied by Toro Construction Company ($45,000), Scarf, Inc. ($20,000), Catherine Scarfo, Scarfo's mother and a resident at and the owner of 26-28 North Georgia Avenue ($7,000), and Lillian Gerace, Gerace's mother and another resident at 26-28 North Georgia Avenue ($20,000) (D68).

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The Division presented documentary evidence establishing that half of Lillian Gerace's contribution to the bail was supplied by Frank Gerace.

On December 28, 1979, Gerace withdrew $10,000 from his $18,316.74 savings account (D69) and transferred it to his checking account (D70). On the same day he wrote a $10,000 check to Lillian Gerace (D71; D72), and she obtained a $10,000 treasurer's check payable to Catherine Scarfo (D73), thus completing the transfer of $10,000 from Frank Gerace's savings account to the $92,000 bail pool (T1197-1206; 1890).

Shortly after Scarfo, Leonetti and Merlino were released on the cash bail Frank Materio put up his house as property bail for Leonetti and Merlino in order that part of the cash bail could be released (T1608; D68). Despite having done so, Materio testified before the Commission that he knew Leonetti only by sight and had never spoken to him, and that he did not know Merlino (T1605; 1626).

Materio did admit that he had a relationship with Scarfo. He said that he had met Scarfo in a bar approximately 25 years ago (T1604), but had only seen him six or seven times in the prior five years (T1604), had never spoken to him on the phone, and had no idea why he was on his telephone list (T1612). Materio also testified that he knew Catherine Scarfo and that occasionally he had played cards with Nicodemo's late father, Dan (T1648).

Materio claimed that Lumio approached him on behalf of Catherine Scarfo and he agreed to use his home as bail as a favor to her (T1628), despite the fact that it is his only real property (T1627) and despite

the further fact that his wife was "dead against it" (T1744).

We find Materio's explanation unconvincing. We cannot believe that he would put up his house, over objection of his wife, as bail for people he barely knew. Even if he thought he was putting up bail for Scarfo, or as a favor to Catherine Scarfo, we cannot believe he would do so if his relationship with these people was as casual as he claims. In the ordinary course a person would not put up his house, or $10,000 of the $18,000 in his savings account, as bail unless motivated by some strong sense of obligation or loyalty.

The telephone list, "KIS-POTS-GON" document, and the providing of bail, taken together, are persuasive evidence that Gerace and Materio have a more than casual relationship with Scarfo and his associates, and that Scarfo has an interest in the affairs of Local 54. However, there is further evidence in this regard which must be considered, much of which is based on the testimony of Joseph Salerno.

Salerno was the principal witness against Scarfo, Leonetti and Merlino at their trial for the murder of Vincent Falcone, and is now in the federal protected witness program. He testified before the Commission, and before the United States Senate (R8), about his experiences while a resident at 26-28 North Georgia Avenue, and in particular about the contact he observed between Scarfo and his associates and Gerace, Materio and other Local 54 officials.

Salerno was a plumber operating a small business in Brigantine, New Jersey (T665-666). In 1978 he encountered financial problems and went to Philip Leonetti,

whom he had met on a job site, for help (T668-669). Leonetti loaned Salerno $10,000 which he said he had gotten from Scarfo (T871), and charged him interest of $250 per week until the principal was repaid (T 669-670). Salerno wound up paying Leonetti $19,000 in principal and interest and going into bankruptcy (T 670).

Salerno also had marital problems and in June 1979 he moved out of his home and Leonetti allowed him to stay at a house in Margate owned by Salvatore Merlino (T671). He later moved to an apartment in Ventnor for two weeks and then into an apartment at 26-28 North Geogria Avenue (T672). He resided on those premises from sometime in September (T672) until December 17 or 18, 1979 (T677).

While residing at 26-28 North Georgia Avenue Salerno had frequent contact with Scarfo, Leonetti, Lawrence Merlino and Lumio, who was then secretary-treasurer of Local 54 and also a resident at 26-28 North Georgia Avenue.

Scarfo bragged to Salerno about having killed a man with a knife (T682) and claimed that his criminal organization was "going to own Atlantic City some day" (T683). He also tried to recruit Salerno into his crime family. He talked to Salerno about their having the same "blood line," asked him if he could "stand up" if he saw "something happen" in front of him, and several times asked him if he "would like to be a gangster" (T678-683). Salerno admitted to the Commission that he was intrigued by the idea of being involved in organized crime, and that he told Scarfo that he would like to be "a gangster" (T852).

Salerno admitted to Scarfo that he had two guns, and, at Scarfo's request, he gave the guns to him (T689-693).

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It was one of these guns with which, according to Salerno, Leonetti murdered Falcone in the presence of himself, Scarfo and Merlino (T693-694). The day after the murder Salerno left 26-28 North Georgia Avenue and soon thereafter he told his story to the police (T701).

Salerno testified that he met Gerace in the office of Scarf, Inc. soon after moving to 26-28 George Avenue (T706). He estimated that he saw Gerace in Scarfo's company 11 or 12 times during the course of his stay at the North Georgia Avenue property from September through mid-December 1979 (T707).

Salerno estimated that three or four of these meetings occurred at the office of Scarf, Inc. (T829); one occurred at the My Way Lounge, a bar owned by convicted extortionist and reputed Scarfo associate Saul Kane (T829-830); three or four occurred outside the premises of 26-28 North Georgia Avenue (T831), and two or three occurred in Scarfo's apartment (T831). The meetings in Scarfo's apartment occurred while Scarfo, Salerno and others, such as Lumio, Leonetti and Lawrence Merlino, were having dinner (T707). Gerace was not part of the dinner group (T865), but he would stop by for long enough to have a glass of wine (T832; 864). Gerace and Scarfo would walk off from the others and talk privately (T708). Salerno said he saw Gerace and Scarfo have these private conversations about six times, but he was never able to overhear what was said (T709).

Additionally, Salerno said that on at least three occasions when he was in the Scarf, Inc. office he accepted telephone calls from Gerace for Scarfo (T717). On the one occasion when Scarfo was at home, Salerno relayed the message to him and Scarfo told him to tell Gerace that he would return the call (T717-718). Scarfo then

went to a telephone booth on the corner to make a call (T718). Besides the three calls he had taken, Salerno said he saw messages for Scarfo from Gerace taken by others (T719).

In his tesimony before the Senate Salerno said that Gerace and Scarfo had daily contact directly involving the operation of the Union (R8, at 99). However, when cross-examined about this statement before the Commission, he admitted that he never overheard any conversation between Gerace and Scarfo and never heard them say anything to each other about Local 54, and had merely assumed that they discussed Union business (T795).

Counsel for the Union and Gerace have made much of this change in Salerno's testimony, and have urged that we reject his entire testimony. However, we can understand how Salerno came to assume that Scarfo and Gerace were conferring about Union business, and we note that when he was cross-examined on this topic before us he readily admitted that he had not actually heard Gerace and Scarfo discuss the Union.

It is clear from Salerno's testimony that he concluded that Scarfo talked to Gerace about Local 54 because of the frequent and surreptitions nature of their conversations, and because of certain statements he had heard Scarfo make about unions and Local 54 in particular.

For example, Salerno testified that Scarfo told him: "Don't ever worry about the unions, we own the unions" (T684). Salerno's testimony also established that Scarfo is a braggart and a liar (T892), and certainly this assertion by Scarfo could not be the basis for a finding that he and his associates "own the unions." However, his claim that they do is evidence of his desire to bring unions

within the sphere of influence of his criminal organization, and helps to explain Salerno's conclusion that Scarfo talked to Gerace about Local 54 business.

Salerno also related an incident when he and Scarfo were in Scarfo's apartment and Lumio stopped in and began reading a newspaper article which linked Scarfo to Local 54 (T714-715). At one point Lumio began to laugh because the article disclosed that he had been convicted of a crime several years earlier (T715). Apparently, Lumio found it humorous that his father might finally come to know of the conviction. This provoked Scarfo, who started to scream and curse at Lumio (T716). Salerno quoted Scarfo as saying:

> Let me tell you something, I got you your job and I got that other big fat j-o [Gerace (T839)] downstairs his job and don't you forget it. (T715)

When he heard this Lumio "just humbled himself kind of and shook his head up and down and just listened and left" (T715).

Salerno identified the newspaper as the *Philadelphia Bulletin* and approximated the date of the article as between early November and mid-December 1979 (T847). Subsequent investigation by the Division revealed that a *Bulletin* article dated December 2, 1982, had discussed the allegation that Local 54 was connected with organized crime, and had noted Lumio's 1974 conviction (D122).

We reject the Division's argument that Scarfo's hearsay statement provides the basis for a finding that Scarfo "engineered Gerace's ascension to the presidency of Local 54." However, we find that Scarfo did make the statement and that based upon the circumstances and Lumio's be-

havior, Lumio did evince his acceptance of the statement. We thus find in this testimony further evidence of Scarfo's desire to influence and control Local 54 and Lumio's belief that Scarfo was in some way responsible for Lumio's position with the Union. This evidence also provides further explanation for Salerno's assumption that Scarfo discussed the Local's business with Gerace.

Salerno also testified to an incident which occurred when he and Leonetti visited a building at 200 Texas Avenue, Atlantic City, which Local 54 had purchased and planned to renovate as its new headquarters (T720). Salerno said that when they arrived they met "Frank Monterino, or something like that" (T721). The Division later established that Salerno was referring to Frank Materio (D65).

Salerno stated that Materio showed him around the building (T721), after which they then rejoined Leonetti, who was conversing with Lumio (T722). Leonetti was insisting that he and Salerno get the plumbing work at the Local instead of a Vineland plumber named Falaska (T722). Leonetti told Lumio that he would inflate the bill and divide the overpayment among the two of them and Salerno (T723). Materio was within earshot of the entire conversation (T723). However, Salerno never submitted a bid on the plumbing work becaues he was busy on other jobs (T723, T881), and the work was done by Falaska (T839-840).

Materio testified that he never saw Leonetti at Local 54 headquarters (T1605) and that he has never met Salerno (T1610), and he denied that he incident described by Salerno ever took place (T1610).

We accept Salerno's testimony that this incident occurred, and find that Leonetti, a close associate of Scarfo,

attempted, albeit unsucessfully, to influence the affairs of Local 54. We also accept Salerno's testimony that Materio was in a position to overhear the Leonetti proposal, and reject Materio's contrary testimony. Further, we find the fact that Leonetti would make this illicit proposal in front of Materio an indication that the association between them is not as casual as Materio would have us believe. Finally, we find that this incident is still further evidence of the interest of Scarfo and his associates in the affairs of Local 54 and a further explanation of Salerno's assumption that Scarfo and Gerace talked about the Union.

Considering all of the evidence discussed to this point—the telephone list, the "KIS-POTS-GON" note, the bail, the Gerace-Scarfo contact and the various incidents testified to by Salerno—a clear picture emerges of a group of criminals who have an interest in unions and especially in Local 54, who covet Local 54 as a vehicle for the spread of their criminal enterprise and seek to exercise influence and control over it, and who have frequent contact with its leaders. As for Gerace and Materio, the evidence shows that they have a long-standing relationship with Scarfo and a sense of obligation to him, and that he has access to them. Whether all of this adds up to the type of association proscribed by section 86(f) is a question we need not decide, because there is considerable evidence, yet to be considered, concerning the Union's dealings with Scarfo associates and the role of Gerace and Materio in those dealings.

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III. DEALINGS OF LOCAL 54 WITH SCARFO ASSOCIATES

The dealings in question fall into two categories: the appointment to Union office or employment of persons tied to Scarfo, and business dealings of the Union with persons or firms tied to Scarfo.

We will deal first with the appointments, starting with a discussion of Gerace's position in the Union and authority to make appointments, then discussing his role in appointing Materio to his Union position, and finally considering the actions of Gerace and Materio in appointing other persons tied to Scarfo to positions within the Union.

Frank Gerace did not testify before the Commission, and the record is sparse on the subject of his background. It appears that he held some elective office in Local 508, which became Local 54 in about 1974, and that he then assumed the vice presidency of Local 54 (T954-958; 1867). Further, it appears that in 1976 he was elected vice president of Local 54 while Jack Brown was elected president. Sometime later in 1976 Gerace assumed the presidency when Brown left to become an organizer with the International (T958). In the beginning of 1978 Brown returned and resumed the top post, but he left again in the fall of 1978 to take a job with the Resorts International Hotel Casino (T958). At that time Gerace again assumed the presidency (T959). He was elected president in 1979 and 1982 (T1867), and he serves in that position today.

As chief executive officer, Gerace is authorized by the by-laws of the Local (C3) "to hire and discharge Business Agents, Organizers, Assistants and all other agents, subject to approval by a majority of the Executive

Board." Article IX, Section 1. Furthermore, Article VI provides in pertinent part:

> [V]acancies in all offices shall be filled for the unexpired term by appointment of the President, subject to the approval of the Executive Board.

Turning to Materio, a letter dated February 2, 1978, from the International to Jack Brown, then president of Local 54, indicates that Brown had solicited financial assistance from the International in order to hire additional employees for the Local (C3, letter of 2/2/78). The International acceded to Brown's request and three "local organizers" were hired by Local 54 on July 3, 1978. One of the three was Frank Materio. Then vice president Gerace moved to accept Materio and the others as organizers (C3, minutes of 6/30/78). On January 16, 1979, the Executive Board approved President Garace's appointment of Materio to the Executive Board as trustee (C3, minutes of 1/16/79).

We turn now to the appointments of the other Scarfo-connected individuals.

Robert Lumio

As previously explained, in August 1979 part of Local 54 splintered away and became Local 491 and Thomas Kissick, secretary-treasurer of Local 54, resigned to join Local 491 (C3, minutes of 8/13/79). To fill the vacated office of secretary-treasurer, Gerace appointed Robert Lumio (D56). Lumio occupied that position until his death by natural causes in June 1981.

We have already explained that Lumio lived at 26-28 North Georgia Avenue and have discussed Salerno's tes-

timony about Lumio's ties to Scarfo. In addition, we note that Lumio characterized himself as being friendly with Scarfo, Leonetti and Lawrence Merlino (D61). He was a proposed alibi witness for Leonetti following his arrest in 1977 for the murder of Guiseppi "Pepe" Leva (D67), and again for Leonetti, Merlino and Scarfo following their arrest in 1979 for the murder of Vincent Falcone (D61).

Frank Materio testified that he put up his house for bail for Leonetti and Merlino as a result of a request made by Lumio on behalf of Catherine Scarfo (T1608).

On April 4, 1979, an agent of the State Commission of Investigation saw Lumio and Nicholas Virgilio exchange a kiss in front of 26-28 North Georgia Avenue (T941-942). On April 7 the agent saw Lumio and Scarfo leave North Georgia Avenue in a car and later return (T942-943). On April 11 he saw Lumio with Scarfo and Leonetti (T943-945). On November 16, 1979, he saw Lumio with Scarfo and Leonetti at the Scarf, Inc. office (T947). Lumio was at the police station when Scarfo was released on bail after his arrest for the Falcone murder (T984) and attended a subsequent celebration at the Scarf, Inc. office (T987). On January 22, 1980, the Philadelphia police photographed Lumio in the company of Virgilio at the funeral of the mother of Saul Kane (T1221; D75). In short, Lumio's ties to Scarfo, Virgilio, Leonetti and Merlino were manifest.

Albert Daidone

According to his testimony before the State Commission of Investigation, Albert Daidone became a member of Local 170, a bartenders local in Camden, in about

1965 (D126, at 25-26). In 1978 he was elected vice president of that Local, running on a ticket headed by Ralph Natale (D126, at 26).

In January 1979 Natale was convicted of arson, racketeering and mail fraud and in February 1979 he was convicted on drug charges. He is serving a 12-year sentence on the former charges and a consecutive 15-year sentence on the latter (T1389; D104; D126, at 144; R8, at 25). He was described by FBI agents testifying before this Commission and the SCI as a major distributor of illegal drugs and the head of an arson-for-hire ring (T1389-1390; D126, at 144), and also as a "very close associate" of Angelo Bruno (D126, at 142). Charles Allen, a government informant and participant in the federal protected witness program, testified before the United States Senate about Natale's organized crime activities (R8) and before the SCI about his involvement with Rittenhouse Associates, a union dental plan administrator with organized crime ties, and with Larry Smith, the head of Rittenhouse (D126).

Daidone told the SCI that he is a friend of Natale (D126, at 32), Smith (D126, at 29-30) and convicted drug dealer (D105-107) Raymond Martorano (D126, at 33). He said it was his custom to see Martorano three or four times a week, and sometimes to act as his driver and to accompany him when he looked for locations to place vending machines (D126, at 34). He also said that he stayed with Martorano every day after Angelo Bruno was murdered, but he denied that he had acted as his bodyguard (D126, at 33-34). Daidone also admitted knowing Angelo Bruno (D126, at 36), Philip Testa (D126, at 37) and Frank Vadino (D126, at 35). He said that he had read in the newspapers that all of the above-named

individuals were connected with organized crime, but that he had no other information in this regard (D126, at 32-38).

When Natale went to prison in February 1979 Diadone continued to serve as an officer of Local 170. However, the Union then became Local 33. According to Daidone's SCI testimony, the new name was intended to "change the image of the union" (D126, at 31). At any rate, in early 1981 Local 33 merged into Local 54 (T1352-1353; C3, minutes of 11/4/80).

When Local 33 merged into Local 54, it became necessary for Local 54 to open a satellite office in Camden. At the Executive Board meeting of December 29, 1980, Frank Materio moved to authorize the Local 54 officers to appoint several individuals to staff the Camden office, including Daidone in the position of business agent (C3, minutes of 12/29/80). Materio told the Commission that at that time he knew nothing about Daidone and made this motion at the behest of Gerace (T1681-1685). Less than four months later, Gerace appointed Daidone to the Executive Board of Local 54 (C3, minutes of 4/28/81). Within another two months Gerace appointed Daidone vice president of Local 54, following the death of Robert Lumio (C3, minutes of 6/8/81).

Daidone remained vice president of Local 54 until his removal in September 1982 during the hearing before the Commission. Counsel for Local 54 explained that Gerace removed Daidone from office due to his indictment, along with Martorano, for conspiracy and extortion, and subsequent indictment for the murder of an official of the Philadelphia roofers union.

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Joseph Erace

Gerace informed the Executive Board at its meeting of March 9, 1981, that Joseph Erace, a business agent, was among three new staff members at Local 54 (D55). On December 14, 1981, Gerace appointed Erace to the Executive Board to complete the unexpired term of a deceased Board member (C3, minutes of 12/14/81).

Donna Savarese, a wine consultant and lounge manager at the Tropicana Casino Hotel, testified that on February 6, 1982, Erace approached her and stated: "I've got a friend I'd like to introduce you to" (T1114). Savarese accompanied Erace to a table where he introduced her to several people, including Scarfo, whom he referred to as "my friend Nick Scarfo" (T1114).

Later, Savarese was again approached by Erace and he questioned her about a member of the Tropicana security staff who had been following him and his party, which included Scarfo. Erace remarked that if this surveillance continued his "friends will take care of him" (T1116). Savarese understood Erace to be referring to Scarfo and his associates as his "friends" (T1116).

Roger Brown, lieutenant of security at the Tropicana, testified that he had been advised that Scarfo, Leonetti and Merlino would be dining at one of the Tropicana's restaurants on February 6, 1982, and that he was directed to keep them under surveillance. During the course of the evening, Brown saw Erace conversing with the three in the hotel lobby for approximately fifteen minutes (T1188). He said that when they approached they were all "friendly," but that the conversation became "business like" and "serious" (T1189).

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Frank Lentino

It is unclear exactly when Frank Lentino first became employed with Local 54. Materio testified that Lentino had worked as a business agent for Local 54 for approximately a year and a half (T1665). On June 8, 1981, Gerace appointed Lentino as Camden County office manager (C3, minutes of 6/8/81).

Lentino was a proposed alibi witness for Scarfo in connection with the Falcone murder (D66). Also, Lentino appears on the Scarfo telephone list under the name Frank Gray, with a coded number (T1034; D9).

There are thus six present or former employees of Local 54, *i.e.*, Gerace, Materio, Lumio, Daidone, Lentino and Erace, who are connected to Scarfo and other members of the Bruno crime family. Of these six, all but Lentino now serve or have served as Union officers. Materio was appointed to his Union office by Gerace, as were Lumio and Erace. Lentino was appointed Camden County office manager by Gerace. Daidone was appointed business agent on Materio's motion and was appointed an Executive Board member and vice president by Gerace.

We turn now to Local 54's business dealings with persons connected with Scarfo.

Toro Construction

At the January 16, 1979, Local 54 Executive Board meeting the board approved an expenditure of $105,000 for renovations of the new union headquarters and authorized the officers to "seek best union contractors" for the job. (C3, minutes of 1/16/79). Toro Construction Company be-

came the general contractor for the renovations (T1673). The job was done in March, April or May 1979 (T893).

As previously noted, Toro contributed $45,000 in cash to the bail for Scarfo, Leonetti and Merlino following their arrest for the Falcone murder (T1159-1160; R8, at 48; D68).

At the March 9, 1981, meeting of the Union Executive Board, a motion was made by Materio and passed by the Board to approve payment of $10,956.22 to Toro (C3, minutes of 3/9/81). It is clear from Materio's testimony before the Commission that when he made this motion he had no idea whether Toro had done work justifying this payment, but that he merely moved to pay the bill because it was on the table before him (T1667-1669). It is not clear if this bill was related to the original renovation work.

Local 54 presented testimony of John Rich, a business agent for Local 33 of the Bricklayers Union and president of the Building Trades Council of Atlantic City, that to the best of his knowledge Toro is a legitimate company, and was one of four or five union contractors he recommended to Gerace for the headquarters renovation. There is no evidence before the Commission of any irregularity in the way Toro obtained contracts or performed work for Local 54. However, Toro is one more connection between Scarfo and the Union.

Rick Casale

Rick Casale is a roofing contractor who was described by an SCI agent who testified before the Commission

as a "very close associate" of Scarfo (T938-939), and whose name was on Scarfo's telephone list (D9). He was also described by Salerno as a frequent visitor to 26-28 North Georgia Avenue (T848-849). Casale did the roofing work on the renovation of Local 54 headquarters (T939). There is no evidence that there were any irregularities in the way the work was done or paid for. However, Casale represents one more connection between Scarfo and Local 54.

Vincent Sausto

Vincent Sausto, whose name was also on the Scarfo telephone list (D9), is an insurance broker and real estate agent who handles insurance policies for Scarfo and his relatives, who has been seen with Scarfo and on the premises of Scarf, Inc. "on numerous occasions," and who has admitted being a "social acquaintance" of Scarfo (T939-940). Sausto received part of the real estate commission on the sale of the Local 54 headquarters building (T939-940). The building was sold for $175,000. The commission was $14,500, of which Sausto received $5,800. The remainder of the commission went to Phillip Guber, the owner of the real estate agency for which Sausto worked, and to a Mrs. Lashman, the listing broker (T978; 996). The commission on the Local 54 building was one of only two real estate commissions earned by Sausto in the year 1979 (T989). Of course, the commission was paid by the seller of the building, a Mr. Jack Apple (T978). However, it appears that Sausto was the agent who represented Local 54 in the purchase of the headquarters property, and he represents one more tie to Scarfo.

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Affiliated Leasing

In March 1979 Affiliated Leasing Systems, Inc. leased a car to Phillip Leonetti. As a result of a "lead" from Leonetti, Affiliated sold a car to Virgilio. On December 18, 1979, Robert Wayne, an account executive with Affiliated and his superior, a Mr. Goldblatt, went to the offices of Scarf, Inc. to deliver the Virgilio vehicle. Leonetti, Scarfo and three or four other persons were present at the Scarf, Inc. office (T1463-1464). Someone suggested to Wayne that he contact Local 54 with regard to the possible leasing of other vehicles (T1466). Wayne testified before the SCI that it was Scarfo who made this suggestion (T1472-1473). In interviews with the SCI, the FBI and the Division, Wayne also identified Scarfo as having made the suggestion (T1474-1475; 1497). However, in his testimony before the Commission Wayne said that "for the longest period of time" he believed it was Scarfo who made the suggestion (T1467), but that he had discussed the matter with Goldblatt, and Goldblatt had told him that he had been sitting next to Scarfo and that Scarfo had said nothing (T1485). Therefore, at the time of his testimony before the Commission Wayne was no longer sure who had made the suggestion (T1467; 1484). But, he did contact Lumio, and as a result Affiliated leased two vehicles to Local 54 (T1468-1470). Shortly before Wayne's testimony the Union returned the vehicles "on the advice of counsel" (T1476).

We find that it was Scarfo who suggested to Wayne that he call Lumio about the possibility of renting cars to Local 54. In addition, the mere fact that the discussion took place in the presence of Scarfo, at the Scarf, Inc. office, is sufficient to find this one more in-

dication of Scarfo's interest and involvement in the affairs of Local 54, notwithstanding Wayne's testimony that the lease agreements between Affiliated and Local 54 were entirely legitimate (T1482-1483). Nevertheless, this is one more instance of Scarfo's involvement in the affairs of Local 54.

Frank D'Addario

Frank D'Addario is a partner in Claridge Associates, which in turn is a partner in Claridge Limited, which owns the Claridge Hotel and Casino. D'Addario is also one of the two members of Claridge Management Corporation, which for a time managed the Claridge. During that time D'Addario met with Frank Gerace and asked him about the unfavorable newspaper publicity involving Local 54 (T1062; 1072). Gerace responded that because of his mother's friendship with Scarfo's mother allegations were being made that Scarfo had influence over the Union (T1062-1063). D'Addario was later introduced to Scarfo at a boxing match at the Claridge, and said to him: "Say hello to my friend, Frank, if you see him" (T1060-1061). Scarfo responded that he had heard of D'Addario "either through or from" Gerace (T1063).

The Division asks us to take Scarfo's statement that he had heard of D'Addario through or from Gerace as an indication that Gerace discusses Union business with Scarfo. However, to do so we would have to accept Scarfo's hearsay statement as true. We can make a finding on the basis of hearsay evidence if it is legally competent evidence under one of the exceptions to the hearsay rule, Evid. R. 63, or, failing that, if it is nonetheless "the sort of evidence upon which re-

sponsible persons are accustomed to rely in the conduct of their serious affairs." N.J.S.A. 5:12-107(a)(6). *See, In the Matter of the Application of Seymour Alter for Licensure as a Casino Key Employee,* Docket No. 79-EA-60 (1980), at 4-7. Scarfo's statement does not fall within any exception to the hearsay rule, and the Division does not suggest that it does. Nor do we think that an off-hand social comment by Nicodemo Scarfo is the type of evidence upon which responsible people would rely in the conduct of their serious affairs. We therefore decline to rely on Scarfo's statement as establishing that he in fact heard about D'Addario through or from Gerace. However, we do find that Scarfo made the statement, and we see it as an indication of his willingness to use his relationship with Gerace to give the impression that they do discuss Gerace's business affairs.

In summary, the "business associations" evidence establishes that the commission for the sale of the Union building was paid in part to a Scarfo associate; the $170,000 renovation fo the building was done by a company which put up $45,000 in bail for Scarfo, Leonetti and Merlino; the roofing work was done by a Scarfo associate; and Scarfo was aware of the Union's need for vehicles and recommended that the leasing company used by Leonetti and Virgilio contact the Union. When these four business connections are considered together with the fact that six persons with ties to Scarfo were officials of the Union, the inference that there is more at work here than coincidence becomes irresistible. However, before attempting to reach any broader conclusions, we must consider one additional evidentiary item urged by the Division, *i.e.,* Gerace's failure to testify, and also give further consideration to the evidence offered by Local 54.

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IV. FAILURE OF GERACE TO TESTIFY

Frank Gerace was called as a witness by the Division and refused to testify, invoking his Fifth Amendment privilege against self-incrimination (T2368-2371), and the Division asks us to make a variety of findings based on Gerace's silence.

Of course, the Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964). Thus, Gerace had a right to invoke the Fifth Amendment and the Commission cannot impose any "penalty" because of his exercise of that right.

However, the Division argues that the drawing of evidentiary inferences from Gerace's silence would not constitute a "penalty." The Division relies on *Duratron Corp.* v. *Republic Stuyvestant Corp., et al.*, 95 N.J. Super. 527 (App. Div. 1967), *certif. den.* 50 N.J. 404 (1967), a civil action seeking damages for fraud, in which it was held that the finder of fact could draw an adverse inference from the refusal of a defendant to testify. The court explained that the defendant "risked only the probative strengthening of a civil claim against himself with an ultimate hazard of nothing more than a money judgment against him," and also that even this consequence did not flow automatically from his invocation of the Fifth Amendment, but lay within the discretion of the factfinder. The court concluded that this was not such a momentous "penalty" as to run afoul of the Constitution, and explained:

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> The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudication. It subserves private justice. We conclude that it does not impair the privilege against self-incrimination.
>
> [95 N.J. Super. at 533]

Similar reasoning has been applied in cases involving consequences other than money judgments. In *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), involving an inmate who refused to testify at a prison disciplinary proceeding, the Court applied "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." 425 U.S. at 318. In *Diebold* v. *Civil Service Commission, etc.,* 611 F.2d, 697 (8 Cir. 1979), the court applied the same rule to an administrative proceeding in which a public employee suspended because of pending criminal charges sought reinstatment in his job.

However, Local 54 and Gerace raise several arguments against the drawing of advere inferences from Gerace's refusal to testify. First, Local 54 appears to argue that the rule permitting an adverse inference against a party who fails or refuses to testify is inapplicable here because Local 54 and the Division are the only parties to this action. However, even assuming that Gerace is not a party, *cf.* N.J.A.C. 1:1-1.4, there is authority to support the drawing of inferences adverse to Local 54 on the basis of Gerace's failure to

testify as a nonparty witness. *See, Brinks, Inc.* v. *City of New York,* 539 F. Supp. 1139 (S.D.N.Y. 1982).

In addition, counsel for Gerace asserts that he advised his client not to testify before the Commission because he is currently a subject of a federal grand jury investigation. However, the pendency of a grand jury probe would not preclude the drawing of an evidentiary inference from Gerace's silence. *Cf., Whippany Paper Board Co.* v. *Alfano,* 176 N.J. Super. 363 (App. Div. 1980).

Counsel for Gerace voices the additional argument that the Division has "unclean hands" in this matter because it could procure Gerace's testimony by requesting that the Commission grant him testimonial imunity. *See,* N.J.S.A. 5:12-67. The Division responds that it has decided not to seek immunity for Gerace as an accommodation to other law enforcement agencies which are "concerned about maintaining the viability of any future criminal prosecution of Gerace" (Reply brief at 10). Regardless of the merits of this controversy, we do not perceive the granting of immunity as being a prerequisite to the drawing of an adverse inference from Gerace's failure to testify.

Finally, Local 54 and Gerace state that the present action was instituted by the Attorney General's Office, of which the Division is a part; is punitive in nature; is based on alleged involvement with organized crime, and has potentially grave consequences for Gerace, Materio and the Union itself. Thus, the Union and Gerace argue, the drawing of any adverse inference from Gerace's invocation of the Fifth Amendment would amount to the imposition of an impermissible "penalty".

It is clear that this is a civil action, and it is also clear that there is nothing punitive about it. We know of no

authority precluding the discretionary drawing of an adverse inference based on the invocation of the Fifth Amendment in a civil action. However, we choose not to draw any inference from Gerace's refusal to testify. The inference flowing from the failure or refusal to testify is permissible, not mandatory. Viewing the record as a whole, we find it unnecessary to draw any inference from Gerace's refusal to speak, and elect to attach no probative significance thereto.

Finally, the evidence presented by Local 54 deserves further consideration.

V. TESTIMONY ON BEHALF OF LOCAL 54

Local 54 presented sixteen witnesses on its behalf. A number of people from the labor movement testified that both Gerace and Local 54 were effective and honest employee representatives. They included: Joseph J. Mendary, a business manager with Local 334 of the International Electrical Workers; Charles Marciante, president of the New Jersey AFL-CIO; John S. Rich, a business manager for Local 13 of the Bricklayers Union and president of the Building Trades Council of the Atlantic and Cape May Counties area; and James Gratton, a busines manager with the Electricians Union for Monmouth and Ocean Counties and president of the Building Trades Council for the same areas. Rich testified: "I would say he's [Gerace] one of the more dedicated labor union leaders that I know. . . . And I don't think that Frank would do anything wrong intentionally" (T2211).

Similarly, several individuals associated with management testified that Gerace was a tough negotiator and that

his paramount concern always seemed to be the welfare and interests of the union members. These witnesses included: William A. Whiteside, Jr., an attorney with Rothschild, O'Brien and Frankel; Donald Buzney, Director of Labor Relations at Bally's Park Place Casino Hotel; William G. Rosenthal, an attorney with Shaw and Rosenthal; William J. Downey, Executive Director of the Casino Hotel Assocation; Martin L. Blatt, an attorney practicing in Atlantic City; Frederick A. Schenck, Senior Vice President of Administration at Resorts International. Rosenthal testified: ". . . he [Gerace] is a responsible labor leader who is interested in the welfare of his members and his constituants [*sic*] who has an interest in the industry and has demonstrated that responsibility throughout our dealings" (T2237).

Three union members testified on behalf of Gerace and Materio. Jane Illingworth, Mickey Fairfield and Michael C. Tenuto testified that both men are accessible to the Union membership, earnest in their desire to serve the membership and honest and straightforward in running the Union. When asked whether he thought Scarfo had any influence on the operations of the Union, Tenuto stated: ". . . I don't think nobody [*sic*] runs the Union except really the members because we call the shots for what we want and he [Gerace] backs us up with [*sic*] the tee" (T2258).

Vincent Pasquale, a catholic priest and director of the Alcoholic Council Service, and Paul Longo, president of the Atlantic City chapter of UNICO, testified that Gerace has an excellent reputation for honesty and integrity.

Finally, Warren Borish testified that he has represented labor unions for approximately ten years (T1808) and has worked closely with Gerace for at least the past five or six years (T1810). Borish described Local 54 as an aggressive,

independent, knowledgeable and successful labor organization (T1811). Further, he characterized Gerace as a "very independent person" who "does what he thinks is best for the interests of the membership" (T1816). Borish contended: ". . . I've seen absolutely nothing over five or six years with relationships with this Local that would indicate that anybody, including Mr. Scarfo or any other person, has any influence over Local 54 or any of its officers" (T1816).

The testimony of Local 54's witnesses is essentially uncontradicted. We have no reason to doubt the sincerity of their testimony, that, to the best of their knowledge, Gerace is a knowledgeable and hard-working union leader and Local 54 is an effective represenative of its members. We likewise accept the testimony of those witnesses who said that they had not discerned the presence of any Scarfo influence in the affairs of the Local.

However, none of this precludes a finding that Gerace and Materio are associated with Scarfo in the manner described in section 86(f). Such an association would of necessity be clandestine and none of these witnesses would be in a position to detect its existence. We will weigh the testimony of Local 54's witnesses along with all of the other evidence in reaching our conclusion as to the qualifications of Gerace and Materio. It is to that conclusion that we now turn.

VI. CONCLUSION AS TO ASSOCIATION OF GERACE AND MATERIO WITH SCARFO ET AL.

The Commission is now called upon to apply a seldom-used but vitally important part of the Casino Control Act,

section 86(f). Before doing we think some general comments on the nature of the casino industry and our role as regulators of that industry are in order.

It can hardy be gainsaid that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper influence. *Niglio* v. *New Jersey Racing Commission,* 158 N.J.Super. 182, 188 (App. Div. 1978); *See also,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). Indeed, the Federal Bureau of Investigation has long maintained that gambling is the "lifeblood of organized crime." *See,* Testimony of Frederich Fehl, Acting Asst. Dir., FBI, before the federal *Commission on the Review of the National Policy Toward Gambling,* Hearings in Washington, D.C., May 10, 1976.

Thus, New Jersey has allowed casino gaming only under an extraordinary, pervasive and intensive system of statutory and administrative controls. *See, Bally Manufacturing Corp.* v. *N.J. Casino Control Commission,* 85 N.J. 325, *appeal dismissed,* 102 S.Ct. 77 (1981); *In re Martin,* 90 N.J. 295 (1982). A review of the legislative history makes it clear that section 86(f) is an essential component of that system.

In 1977, the Attorney General and the Treasurer of New Jersey, at the Governor's request, assembled a group of senior staff personnel to make recommendations on casino gambling legislation and related topics. That staff policy group concluded that "the uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casino and related op-

erations." *Second Interim Report of the Staff Policy Group on Casino Gambling,* (1977) at 2. The report went on to emphasize that the state interests to be served by a comprehensive regulatory scheme included more than the traditional law enforcement interest. *Id.*

Moreover, prior to the enactment of the Casino Control Act, the State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey,* (1977) at III. The SCI emphasized that only the "most stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." *Id.* at II.

Significantly, the SCI noted that its experience regarding organized crime strongly suggested that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification according to

> the ownership disqualification criteria. (*Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, Id.* at 2)

Accordingly, the State Commission of Investigation recommended regulation over labor unions affiliated with Atlantic City casino hotel facilities. *Id.* It is not surprising that the New Jersey Legislatiure heeded that advice. Indeed, in enacting the Racketeer Influence and Corrupt Organizations (RICO) Act, 18 U.S.C.A. §1961 *et seq.*, in 1970, Congress also recognized the explosiveness of the combination of labor racketeering and gambling.

The record in this hearing is replete with examples of organized crime infiltration of labor unions. We have previously mentioned the situation of Local 170 under Ralph Natale. We will turn to another such situation, that of Teamsters Local 326, shortly. The transcript of the United States Senate hearing on organized crime involvement in unions (R8) refers to many more examples. Of course, the problem of organized crime infiltration of labor unions becomes all the more acute in the case of a union which represents workers in the gambling industry.

In addition, we cannot overlook the fundamental policy of the Act to foster public trust and confidence in the integrity of the casino industry and related operations, and in the efficacy of the regulatory process.

At the very heart of the public policy set forth in the Casino Control Act is the assurance of "the public confidence and trust in the credibility and integrity of the regulartory process and of casino operations." N.J.S.A. 5:12-1(b)(6). Directly related to this purpose is the legislative declaration that "the regulatory provisions . . . are

designed to extend strict State regulation to all persons . . . practices and associations related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Id.*

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness' to the end that public confiedence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. *Knight* v. *City of Margate,* 86 N. J. 374, 392 (1981).

With this background in mind we must apply section 86(f) to the facts as we find them in this case.

Section 86(f) provides for disqualification upon the finding of an association with a career offender or career offender cartel member "in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations."

There is no doubt that Gerace and Materio have an association with Scarfo, *et al.* The issue before us is whether that association has been shown to be inimical to the policy of the Act and to gaming operations. Viewing the record as a whole, we must conclude that it has.

We have been presented with a clear picture of a dedicated group of lawbreakers, headed by Scarfo, who follow the activities of Local 54, have a longstanding relationship with and easy and frequent access to its leaders, and seek to exploit that relationship in order to advance their criminal activities. We have also seen a consistent pattern of the Union staffing its hierarchy with persons associated

with Scarfo and doing business with persons and firms with ties to Scarfo. The evidence presented during this hearing simply cannot be explained away as a matter of chance or coincidence, or as the result of Gerace's mother being a friend of Scarfo's mother or Materio having played an occasional game of cards with Scarfo's late father.

In other words, the appointments and business associations, when viewed in the light of the evidence concerning Scarfo's interest in the Union and access to its leaders, lead ineluctably to the conclusion that there is a "Scarfo effect" at work in this Union. It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrary evidence. However, the sheer number of instances renders it impossible to ascribe them to coincidence or to anything other than Scarfo's influence over Gerace and Materio.

We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise improperly in the conduct of the Local's affairs, or that any of the business associations were other than legitimate. However, once the influence of a career criminal such as Scarfo has been shown, we need not wait for its inevitable detrimental effect on the Union and utlimately on the casino industry to become manifest before we can act. The fact of influence by a person such as Scarfo is inimical to the policy of the Act and gaming operations.

Briefly reviewing the evidence with specific reference to Gerace, Scarfo kept Gerace's name, and those of his

mother and "girl" on his telephone list in code. Gerace covertly put up $10,000 in bail for Scarfo, Leonetti and Merlino. In three and one-half months at 26-28 North Georgia Avenue, Salerno observed frequent contact between Gerace and Scarfo, including private conferences and a call returned from a telephone booth. Gerace appointed Materio, Lumio, Daidone, Erace and Lentino to their Union posts. As president of the Union he was surely involved in the various business dealings with Scarfo associates. In short, it is clear to us his association with Scarfo is of such a nature as to create a reasonable belief that it is inimical to the policy of the Casino Control Act and to gaming operations. Such an association flies in the face of the stated statutory and policy considerations and cannot be accepted.

As to Materio, his name was on Scarfo's telephone list, although he claimed to have no idea why. He put up his house as bail for Leonetti and Merlino, although he claimed he barely knew them. He testified that he put up his house as a favor to Catherine Scarfo, but offered no reasonable explaination of why he would take such action on her behalf. He proposed that the Union pay Toro Construction over $10,000 but had no idea if Toro had done any work justifying the payment. He moved before the Executive Board to authorize the appointment of Daidone to the Union staff, but claimed that when he did so he knew nothing about Daidone. Leonetti made his proposal to inflate the bill for the plumbing at the Union headquarters in front of Materio, and Materio said nothing. The minutes of the Executive Board meetings show that Materio, to give a few examples, moved to accept the appointment of Lumio as secretary-treasurer (C3, minutes of 8/13/79), nominated Lumio to run for election as secretary-treasurer

(C3, minutes of 10/1/79), seconded the nomination of Gerace to run for president (C3, minutes of 10/1/79), moved to authorize the officers to appoint Daidone as business agent (D125, minutes of 12/29/80), moved to accept the appointment of Daidone to the Executive Board (C3, minutes of 4/28/81), moved to accept the appointments of Daidone as vice president and Lentino as officer manager (C3, minutes of 6/8/81), moved to approve the appointment of Erace to the Executive Board (C3, minutes of 12/14/81) and nominated Erace for election to the Executive Board (C3, minutes of 6/7/82).

In Materio's case we do not have evidence of direct, frequent contact with Scarfo, *et al.* However, the nature of their relationship is revealed by the telephone list, the bail and the incident involving the plumbing at the Union headquarters. When Materio's actions as an Executive Board member are viewed in light of this relationship, we must conclude that an association inimical to the policy of the Act and to gaming operations exists.

We therefore find that Frank Gerace and Frank Materio are disqualified under section 86(f).

There is one other alleged association which the Division urges as a section 86(f) disqualifier, *i.e.*, that between Gerace and Eugene Boffa, to which we will now turn.

VII. ASSOCIATION OF GERACE AND BOFFA

Eugene Boffa was for some years engaged, through a variety of corporations, in the labor leasing business. He would, for a fee, provide a business, such as a trucking company or a hotel, with all of its workers. The workers would be employed by Boffa, and he would handle the col-

lective bargaining, labor disputes, payment of wages and benefits, etc.

Labor leasing can be a legitimate business, but it was not in Boffa's case. He employed workers from Teamsters Local 326 in Delaware (T1270) and made regular payments to the Local's president, Frank Sheeran, in exchange for which Sheeran did a variety of things favorable to Boffa and inimical to his Union's members. In short, Boffa was buying labor peace (T1275-1277). As a result of their activities Boffa and Sheeran were convicted on a variety of federal criminal charges (D86). Boffa was sentenced to 20 years in prison and Sheeran was sentenced to 18 years (T1282). It seems clear that Boffa is a career offender.

The Division placed in evidence transcripts of two taped conversations, one between Charles Allen and Sheeran (D81) and the other between Allen and Boffa (D84). Both were made while Allen was carrying a recorder placed on his person by the FBI.

The taped conversation between Allen and Sheeran occurred on December 1, 1978. They discussed labor leasing arrangements involving, *inter alia*, hotels (D81, at 4-6). The only reference of direct relevance to this case is the following:

> FS: Yeah, I want, I just gotta meet this guy from Local 54, Frank Recia is his name?
>
> CA: Yeah.
>
> FS: You know him?
>
> CA: Yeah.
>
> FS: Frank—I can't pronounce his name. I got a name, here. I got to meet Ralphie tomorrow at 12 o'clock. (D81, at 5)

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It seems reasonable to conclude that the "guy from Local 54" is Gerace, who at that time was president of the Local. It also seems clear that "Ralphie" is Natale, who was then secretary-treasurer of Local 33. Sheeran and Natale were corrupt labor leaders. However, the fact that Sheeran was going to meet Gerace does not justify an inference that they were meeting for a venal purpose. The tape gives no indication of Sheeran's purpose in meeting "Frank Recia," and therefore this tape is not of great significance.

On the Allen-Boffa tape there is a clearer and potenitally more damaging reference to Gerace. The transcript of the tape reads:

> "EB: (Unintelligible) You know, I don't bother like, even with Atlantic City—I'll give you an example—this guy is hot shit there—the union guy down there. He was a nice guy so come—I said, OK 'Here, buy yourself something.'
>
> CA: What union? Teamsters?
>
> EB: Uh, no. The other guy, uh Frank Gerace.
>
> CA: Oh. You want somethin' done with him?
>
> EB: No, he's alright.
>
> CA: Okay, Okay.
>
> EB: I said, 'Here, buy yourself something' (Unintelligible) I says, 'this has nothing to do with this, alright?' So he tells them that I gave him something, see. So he says, 'Hey, don't give them nothin'.' 'It goes to us.' 'Hey,' I said, 'I don't give a shit. I haven't given him anything.' It's just like if you came into me and, uh, I threw you a tip or something. I'm not, uh, I'm not paying you off. I'm not saying I give it to you, I don't want to give it to them. It had nothing to do with them. He didn't use his head. So, now I can't give him nothing even if I want to.

CA: Hmm. And he told them. Who, who did he tell?

EB: He told Frank.

[D84, at 22-23]

The Divison presented other evidence indicating that Boffa had a labor leasing agreement with Penthouse International to supply workers to the Holiday Inn in Atlantic City, and that the Holiday Inn was a signatory to the non-casino hotel contract with Local 54. On the basis of this evidence and the above-quoted conversation, the Division asks us to find that Boffa made a payment to Gerace "for the purpose of purchasing labor peace at the Penthouse Holiday Inn project, and that this payoff may have manifested a corrupt agreement between Gerace and Boffa to enrich themselves, possibly at the expense of Local 54 employees" (Brief at 48). If the Commission did make such a finding, it would be dispositive on the issue of Gerace's disqualification, as it would evidence not only an association with a career offender, but an association for a corrupt purpose, which would certainly satisfy the "inimical" requirement of section 86(f). In addition, if Boffa was supplying workers to the Holiday Inn and Gerace was representing those workers, any payment by Boffa to Gerace, regardless of its purpose, would be a misdemeanor under 29 U.S.C.A. § 186. Commission of this misdemeanor, even without prosecution, might also disqualify Gerace under sections 86(g) and 86(c)(4) of the Act.

However, in our opinion the Division's interpretation of the facts is not supportable. The first question in this regard is whether the record justifies a finding that Boffa in fact gave money or some other thing of value to Gerace. Certainly Boffa seems to be saying that he gave Gerace

money. Allen told the Senate that "Eugene Buffalino [*sic*] . . . mentioned that he gave a gift, meaning money to Frank Gerace, and that Fra[illegible] Sheeran, the man I work for, got mad at him . . ." (R8, at 85). Thus, Allen apparently understood Boffa to be saying that he gave money to Gerace. However, the question is whether Boffa's statement to Allen can form the basis for finding as fact that a payment was made.

Boffa's statement is obviously hearsay, and thus can support a finding of fact only if it fits within one of the exceptions to the hearsay rule or if the Commission finds it to be reliable evidence under section 107(a)(6) of the Act.

Only one of the exceptions to the hearsay rule has any possible relevance here, namely, *Evid. R.* 63(10), which provides:

> A statement is admissible if at the time it was made it was so far contrary to the declarants pecuniary or proprietary interest or so far subjected him to a civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true . . ."

Bearing in mind that we are dealing here with a transcript of a conversation between a career criminal and a career criminal-turned-informer, in our view it it not clear that Boffa made a declaration against interest within the meaning of the above-quoted evidence rule. Boffa would probably not have believed that his statement to Allen would subject him to pecuniary or

proprietary loss, subject him to civil or criminal liability, or expose him to "hatred, ridicule or social disapproval in the community."

The question then becomes whether Boffa's statement is nonetheless reliable within the parameters of section 107(a)(6). Again, this was a conversation between two career criminals. One of the participants, Allen, was lying throughout the conversation because he had an ulterior motive, namely cooperating with the FBI. There is no way of knowing what motive Boffa may have had in talking to Allen. In our view responsible persons conducting serious affairs would not rely on the statements made by Boffa to Allen on this tape.

Even if we were to find that a payment was made, other factual determinations would have to be made. For instance, it would have to be determined whether, as the Division urges, that the payment was a payoff for labor peace. Boffa clearly seems to be saying to Allen that he was not paying off Gerace. The Division is apparently asking the Commission to accept Boffa's statement that he gave money to Gerace but to reject his statement that it was not a payoff. We are not aware of any basis to support this kind of selective acceptance of Boffa's comments.

Furthermore, the Division's argument is premised on the assumption that Boffa supplied workers to the Holiday Inn at a time when the Holiday Inn was a Local 54 shop. There is evidence in the record from which it could be found that a company controlled by Boffa, American Labor Services, did supply workers to the Holiday Inn, but it is questionable whether the record would support a finding that American Labor Services used Local 54 employees.

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FBI agent Tamm testified that he did not know if there was ever a collective bargaining agreement between American Labor Services and Local 54, but that he assumed there was because of the statement in the Allen-Sheeran tape that Sheeran was going to "meet this guy from Local 54, Frank Recia" (T1356-1357; T 1362; D81, at 5). However, during cross-examination Tamm agreed that the Allen-Sheeran tape indicated that whatever payoffs were being made, at the Holiday Inn or elsewhere, were being made to Sheeran (1335).

The Division correctly points out that the Local 54 Executive Board minutes of 9/12/77, 10/3/77, 12/5/77, 2/13/78, 4/3/78, 9/5/78, 3/5/79, and 4/4/79, contain references to arbitration and contract matters concerning the Holiday Inn, and that the minutes of 9/10/79 contain a reference to an agreement with Penthouse regarding welfare benefits. It thus seems clear that there was a collective bargaining agreement between Local 54 and the Holiday Inn, and specifically between Local 54 and Penthouse as the owner of the Holiday Inn. However, the question is whether the relationship between the Holiday Inn and Local 54 continued during the time that American Labor Services supplied employees to the hotel. On this question the deposition of Gerald Adler, a former Penthouse employee, is the only evidence.

Adler said that he attended a meeting sometime around April or May of 1978, at which Boffa proposed a labor leasing agreement between American Labor Services and Penthouse (D124, at 87-89). Adler identified a memo which he wrote after that meeting. The memo is dated May 1, 1978, and states: "Boffa will: Negotiate details of labor contracts; notify union and association

that we withdraw; negotiate new contracts with operating engineers and casino workers; do background checks; maintain labor pool" (D124, at 96-97). The record does not contain any explanation of the phrase "notify union and association that we withdraw," although this might indicate that the Holiday Inn was withdrawing from the industry-wide contract with Local 54.

Adler's deposition establishes that Penthouse did enter into a contract with American Labor Services, but does not establish when the contract commenced or when it ended. He was shown an unsigned contract dated July 9, 1978, and said that it "could have been" a contract submitted by Boffa (D124, at 97-98). He also identified a letter which he sent to Boffa suggesting changes in the contract Boffa had proposed. The letter is simply dated "October." Adler could not understand the date because he left Penthouse's employ in late September (D124, at 102). He "supposed" that the letter was sent sometime in July, August or September 1978 (D124, at 103). Adler said that he did not remember when American Labor Services actually started supplying workers at the Holiday Inn but that he had "a feeling they would have waited until something was signed before starting" (D124, at 102). Finally, Adler said the "several months" after he left Penthouse he heard that they had "dropped" American Labor Services (D124, at 133-134).

It thus appears that Boffa supplied workers to the Holiday Inn for some relatively brief period of time during the latter half of 1978. However, it seems to us speculative to conclude that Boffa's company utilized Local 54 workers.

Even if it is assumed that American Labor Services had a collective bargaining agreement with Local 54 during the

time that it supplied workers to the Holiday Inn, and also assumed that Boffa made a payment to Gerace, the Division's argument requires the further assumption that the payment occurred during the time that American Labor Services was supplying workers to the Holiday Inn. However, as previously explained, the record does not definitely establish the time during which the contract between American Labor Services and Penthouse was in effect or the time of the alleged payment to Gerace. The contract between American Labor Services and Penthouse was probably in effect for some brief period during the second half of 1978. The taped conversation between Boffa and Allen occurred on February 2, 1979. Thus a payment may have been made during the time that the contract was in effect, but again the Commission is left to speculate.

We, therefore, do not think this evidence provides a basis for disqualifying Gerace.

Kirkland and LaSane

The first question with respect to Kirkland and LaSane is whether they are officers, agents or principal employees of Local 54 within the meaning of section 93.

N.J.A.C. 19:41-12.1 defines "agent" as:

> any person, whether compensated or not, who is authorized or allowed to represent a labor organization in any employment matter relating to employees licensed under the act and employed by a casino hotel or casino licensee, or who undertakes on behalf of the labor organization to promote, facilitate or otherwise influence the relations between the labor organization and the casino hotel or casino licensee.

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Eli Kirkland has been employed by Local 54 for approximately two and one half years (T215) and receives a salary of $400 a week (T216). He handles grievances emanating from union members employed in kitchen and maintenance positions in the nine operating casino hotels (T216, 218). Kirkland testified that he attends hearings with union members and attempts to resolve their differences with management (T216).

When asked what the title of his job was, Kirkland answered, "I guess you could call me like an agent" (T248). Kirkland identified himself as an "agent" on his Labor Organization Individual Disclosure Form filed with the Commission (D8).

Karlos LaSane has been employed with Local 54 since May 4, 1981 and receives $410 a week in salary (T287-288). LaSane represents union members employed at Bally's Park Place and Caesars Boardwalk Regency at grievance hearings. Mr. LaSane testified that he attends grievance hearings, speaks on behalf of union members and attempts to resolve whatever problems exist between the employees and management (T290).

LaSane contended that he receives an average of fifteen calls a day from Union members "seeking information on filing grievances, interpretation of the contract and what Management is doing or not doing in respect to the Collective Bargaining Agreement" (C4). He added that he places "an average of five calls a day to Management trying to resolve grievances without hearings to the benefit of [Union] members . . ." (C4). LaSane described his responsibilities as essentially the same as Kirkland's (T291).

Furthermore, LaSane has been informally designated by Gerace as Local 54's affirmative action officer (T327). In

this capacity, LaSane handles discrimination complaints which emanate from any of the casino hotels (T337-338). LaSane testified that he has familiarized himself with the rules and regulations pertinent to affirmative action (T327) and has acquainted himself with agencies and organizations which may complement his efforts in resolving discrimination complaints (T328, 338).

LaSane identified himself as an "agent" on his Labor Organization Disclosure Form (D1).

We find that Kirkland and LaSane are both "agents" within the meaning of N.J.A.C. 19: 41-12.1. It is clear to us that both represent Union members working within the casino industry in employment matters. Although the Division contends that they are also "principal employees," we will not decide this issue.

Since Kirkland and LaSane are agents, we must determine whether either is disqualified pursuant to section 86.

Kirkland has a criminal record which consists of five convictions. We note that Kirkland filed his Labor Organization Individual Disclosure Form with the Commission on June 19, 1981. Consequently, section 86(c)(1) containing a list of disqualifying offenses from the "New Jersey Code of Criminal Justice," L. 1978, c. 95 (Title 2C of the New Jersey Statutes) is controlling. *See, In the Matter of the Application of Robert A. Ferrin for Licensure as a Casino Employee*, Docket No. 79-EA-207 (1981) at 10-12.

On May 7, 1964, Kirkland was convicted in United States District Court for the District of New Jersey of unlawfully selling a narcotic drug, namely 168 milliograms of cocaine, in violation of 26 U.S.C.A. §§4704(a) and 7237(a) (D3). This offense is comparable to a high misdemeanor under

N.J.S.A. 24:21-19(b)(1). *See,* N.J.S.A. 24:21-6(c)(4). Accordingly, we find that this offense is a listed disqualifying offense pursuant to section 86(c)(3) of the Act.

On November 1, 1968, Kirkland was convicted of possession of narcotics in violation of N.J.S.A. 24:21-20 (D4). This offense is not listed as a disqualifying offense in sections 86(c)(1), or (3).

On July 8, 1969, Kirkland was convicted of grand larceny contrary to the provisions of N.J.S.A. 2A:119-2 (D5). Although this offense is listed in section 86(c)(2), we find insufficient support in the record to conclude that it is a disqualifying offense pursuant to section 86(c)(1).

In 1975, Kirkland was indicted on six counts for sale of lottery tickets, possession of lottery paraphernalia and engaging as a lottery clerk in violation of N.J.S.A. 2A:121-1 and 3 (D6). The record of the criminal proceeding indicates that Kirkland was found guilty and sentenced to "a term of not less than two and no more than three years on each count, sentence to run concurrently . . ." (D6). We are unable to tell with certainty from this record the offense for which he was convicted or much of the factual circumstances surrounding these offenses. Section 86(c)(2) indicates that the commission of any offense under 2A:121-1 *et seq.* constitutes a disqualifying offense, but we are unable to find that these offenses are disqualifying pursuant to section 86(c)(1).

Lastly, on September 15, 1976, Kirkland pled guilty to possession of lottery slips and permitting a lottery on his premises in violation of N.J.S.A. 2A:121-3(b) and (c) (D7). Again, the record will not permit us to convert these offenses to comparable offenses listed in Section 86(c)(1).

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Since Kirkland has four convictions for offenses which are not specifically disqualifying, we would ordinarily undertake an "inimical analysis" pursuant to section 86 (c)(4) which considers whether these offenses indicate that Kirkland's licensure would be inimical to the Act or to casino operations. Such analysis would consider a number of factors including the nature of the offense, the surrounding events, the remoteness of the offense, and the offender's conduct since that offense. *In the Matter of the Application of Resorts International for a Casino License,* Docket No. 79-CL-1 (1979) at 15. However, in light of our subsequent discussion and conclusion, we think it is unnecessary to reach specific findings in this regard.

Section 93(b) provides that "[t]he commission may for the purpose of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require."

Furthermore, section 86(c)(4) states:

> . . . the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification . . .

Kirkland was released from prison sometime in 1978 (T225, 257). The record indicates that since that time he has been wholly free from any criminal involvement. Kirkland is now fifty years of age (T254; D8).

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Carroll Edmonson, executive director of the Atlantic City Human Relations Commission, testified that he has known Kirkland of approximately four years (T370) and has found him to be an honest and forthright individual (T371).

Donald Young, an officer in the National Society of Volunteers of America, also testified on behalf of Kirkland. The Volunteers of America operate several halfway houses which attempt to help ex-offenders become assimilated into society (T385). Mr. Young stated that he had known Kirkland for a little less than a year (T390), but in that short span Kirkland had been instrumental in assisting several ex-offenders procure employment in the casino industry (T386). Young stated that he had a high opinion of Kirkland and felt that he was an excellent example for the young men who have just been released from prison and are attempting to rebuild their lives (T387).

Lastly, Arrawanna Allen, an affirmative action specialist with the City of Atlantic City, indicated that she has worked with Kirkland on several occasions and always found him to be courteous and professional in their dealings (R2).

The Commission was impressed by Kirkland, and found him to be a man who wished to put his criminal experiences behind him and live a better life. His testimony was entirely credible. We are persuaded that he has rehabilitated himself and should be permitted to continue to work in his current position. Accordingly, we find that there is clear and convincing evidence that Kirkland's automatically disqualifying conviction which occurred more than 10 years before he filed his application does not justify disqualification under section 86

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(c)(4). We further resolve to waive Kirkland's other offenses pursuant to section 93(b).

The Division also alleges that Kirkland should be disqualified on the basis of a nondisclosure pursuant to section 86(b). Kirkland disclosed only his 1969 larceny conviction and his 1975 lottery conviction in response to question 10 on his Labor Organization Individual Disclosure Form, which requests an applicant to report all criminal convictions (D8). Kirkland explained that Lumio had instructed him, when he gave him the form, to put down his most recent convictions (T243). Kirkland testified that he did not intend to mislead anyone by his failure to include his other convictions (T 244). We note that question 10 on the registration form provides space for only two answers. However, a full page is provided at the end of the form for the purpose of supplementing incomplete answers (*see*, D8, at 11).

It is well settled that nondisclosure of criminal offenses on an application form will support disqualification pursuant to section 86(b) when the nondisclosure is intentional or evinces a conscious disregard for the regulatory process. *In the Matter of the Application of Resorts International Hotel, Inc., for a Casino License*, Docket No. 79-CL-1 (1979), at 13.

We believe that the nondisclosures were inadvertent. We also note that Kirkland revealed two of his most recent and most serious offenses. Kirkland indicated that he was not attempting to conceal his undisclosed convictions. We think this testimony was candid and honest and we have already found him to be a thoroughly credible witness and see no reason to disturb that conclusion here.

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Lastly, the Division asserts that Kirkland is a career offender and should be disqualified on the basis of section 86(f). In view of our discussion above, we think little need be said with regard to this issue beyond the simple conclusion that we do not believe that Kirkland should be disqualified as a career offender. Accordingly, with regard to Kirkland, we find no valid basis for his disqualification.

LaSane was convicted in United States District Court for the District of New Jersey on May 21, 1973, of interference with commerce (extortion), aiding and abetting and conspiracy in violation of 18 U.S.C.A. §1951 (D2). He was a Commissioner of the City of Atlantic City, specifically the Director of Parks and Public Property, from May 21, 1968 until the time of his indictment (D2). According to the indictment, LaSane obstructed and delayed the construction of public projects, purchases of goods, property and services, and the licensing of firms which sought to do business with the City of Atlantic City in order to obtain monies from contractors, engineers, property owners, suppliers and licensees "by the wrongful use of fear and under color of official right" (D2). LaSane served one year and twenty-one days for this offense (T329).

The Division contends that this offense disqualifies LaSane pursuant to sections 86(c)(1), (c)(4) and (e). However, during the course of the hearing it came to light that the Division had apparently taken a different position on the matter in considering another application submitted by LaSane (C2). LaSane had previously submitted an application for a casino hotel employee license. The application was filed with the Commission on April 7, 1981 (C1). LaSane disclosed his conviction

on this application form just as he did on his Labor Organization Individual Disclosure Form (D1).

Some background is necessary to fully understand what occurred. On February 15, 1982, amendments to the Casino Control Act became effective which eliminated the licensure requirement for casino hotel employees and established a registration requirement in its stead. L. 1977, c.110. By virtue of these amendments, upon petition by a casino licensee or temporary casino permittee a person could begin employment as a casino hotel employee after he has filed an application for casino hotel employee registration. *See,* N.J.S.A. 5:12-91(f). Under the registration system the evaluation of the suitability of a casino hotel employee occurs after he is eligible for employment, rather than before, as under the licensure system.

The amendments to the Act further provided that any person who had a completed application for a casino hotel employee license pending before the Commission would be considered registered. N.J.S.A. 5:12-91(f). LaSane therefore became registered with the Commission and eligible for employment on the effective date of the amendments.

In an internal memorandum dated March 24, 1982, the Division indicated that it had reviewed LaSane's qualifications and determined that there was no cause to disturb his status as a casino hotel employee registrant (C2).

The Division's position that LaSane is qualified as a hotel registrant was not taken as part of the hearing on the instant matter. That position was merely expressed in an internal Division memorandum. None of the parties took any action in reliance on the Division's position with re-

gard to LaSane's suitability as a hotel registrant or would in any way be prejudiced by allowing the Division to take a different position as to LaSane's fitness to serve as a union agent. We find that the Division memorandum listing LaSane as a satifactory registrant has no bearing on the matter before us. Accordingly, we now consider whether LaSane's conviction will disqualify him pursuant to the provisions of the Act.

The Division contends that LaSane is disqualified pursuant to section 86(c)(1) since his federal conviction is analogous to listed disqualifying offenses, namely, N.J.S.A. 2C:5-2 (conspiracy), N.J.S.A. 2C:20-5 (theft by extortion), N.J.S.A. 2C:27-2 (bribery in official and political matters), N.J.S.A. 2C:27-4 (compensation for past official behavior), N.J.S.A. 2C:27-6 (gifts to public servants), N.J.S.A. 2C:27-7 (compensating public servant for assisting private interests in relation to matters before him), N.J.S.A. 2C:30-2 (official misconduct) and N.J.S.A. 2C:30-3 (speculating or wagering on official action or information). The Division further contends that LaSane is disqualified on the basis of sections 86(c)(4) and 86(e). LaSane filed his Labor Organization Individual Disclosure Form with the Commission in June 1981 (D1).

As previously indicated, LaSane has been convicted of interference with commerce (extortion), aiding and abetting and conspiracy. We find that the offense for which LaSane was convicted is the equivalent of a violation of N.J.S.A. 2C:20-5(d), which is a disqualifying offense listed in section 86(c)(1). We find that LaSane was acting in his official capacity as a Commissioner of the City of Atlantic City when he committed the acts which constitute the federal offense. We further note the repetitive nature of his criminal acts.

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LaSane was convicted of a particularly noxious crime in our view. He had obviously attained a measure of success as a City Commissioner, but he perverted his office and abandoned the trust reposed in him by the voting public.

Carroll Edmonson, mentioned above, testified on behalf of LaSane. Edmonson stated that LaSane has an excellent reputation for honesty and integrity in the community (T373). He added that it was his view that LaSane was thoroughly rehabilitated (T374).

Furthermore, several letters were introduced into evidence on behalf of LaSane (R1, R2, R3, R4, R5, R6 and R7). These letters attest to LaSane's good character, courage and integrity. The letters were authored by: Gene L. Hudgins (R1), Arrawanna Allen (R2), Isaac S. Cole, Pastor of the Second Baptist Church in Atlantic City (R3), Barbara L. Hudgins (R4), Pierre Hollingsworth, president of the Atlantic City branch of the NAACP (R5), Carroll Edmonson (R6), and Reverend Leroy T. Griffith (R7).

We have listened to LaSane testify before us and have assessed his credibility. We are not convinced that the public policy of the Act or the interests of justice require a waiver of his disqualification.

Considering our conclusion, we believe it is unnecessary to determine whether LaSane's federal conviction is analogous to the host of other listed offenses proposed by the Division. Nor do we deem it necesary to consider disqualification under section 86(c)(4) or 86(e).

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Conclusion

For all of the reasons herein stated we find Frank Gerace and Frank Materio are disqualified under section 86(f) and that Karlos LaSane is disqualified under section 86(c). We wish to afford all interested parties a reasonable opportunity to effect the removal of Gerace, Materio and LaSane as officers, agents or principal employees of Local 54 before taking remedial steps as provided by section 93(b). We will therefore issue an order providing that, in the event Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will be thereafter prohibited from receiving dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent. Our order will further require the parties to submit briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitions against "administ[ration of] any pension or welfare funds." N.J. S.A. 5:12-93(b). In the briefs the parties shall discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether the cessation of dues collection and the cessation of administration of pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties may make whatever written factual submissions they deem appropriate. In its brief the Division shall make clear what remedial action it will request the Commission to take in the event that Gerace, Materio or LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982.

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SEPARATE OPINION OF COMMISSIONER JACOBSON

I respectfully disagree with the majority opinion insofar as it finds Frank Gerace, Frank Materio and Karlos LaSane disqualified under sections 86(c) and (f).

Frank Gerace and Frank Materio

I agree with the findings of the majority concerning the organized crime involvement of Nicodemo Scarfo, Nicholas Virgilio, Philip Leonetti, *et al.* The evidence in this respect is conclusive.

It is also apparent that an association between Frank Gerace, Frank Materio and Nicodemo Scarfo has existed.

The issue to be determined by this Commission is whether this association is "inimical" to the policy of the Casino Control Act and to gaming operations.

In my judgment, the evidence submitted in this proceeding is insufficient to justify such a conclusion.

It is always distressing to observe any degree of association between law-abiding citizens and mob-related felons. It is particularly gnawing when high-ranking union officials, charged with the obligation of serving as trustees for the welfare of their members, permit such associations to exist, for any reason.

One would normally expect militant trade union leaders dedicated to the principles of democratic trade unionism to seek close, personal relations with individuals and organizations determined to fight for social and economic justice, not to have associations with mob-related, tyrannical oppressors, motivated by personal greed.

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The association of Frank Gerace and Frank Materio and the others whom they have appointed to positions in Local 54 to Scarfo, *et al.* is distressing. However, the evidence concerning their associations does not lead me to conclude that the unseen hand of Scarfo is at work in this Union.

Each of the individuals appointed to positions within the Union has long been at work in the industry and each has emerged from the Union's rank and file membership.

Gerace was a waiter (T1778) and rose through Local 508 to his present position in Local 54. Materio was and still is a bartender (T1599). Lumio (T1779) and Daidone (D126, at 25) were bartenders. Erace was a maitre d' (T1725). There is no probative evidence that Scarfo caused these persons to be appointed to their positions with the Union or has had any influence over the manner in which they have performed their union duties. Local 54 presented sixteen witnesses, including members of the union employed in casino hotels, other respected union leaders, casino industry representatives, attorneys specializing in labor law and persons active in community affairs, all of whom praised Local 54 and its leadership as active, aggressive and effective representatives of the membership. This evidence was uncontradicted.

All of these witnesses portrayed Gerace as a vigorous and dedicated union leader (T2186; 2211). He was further characterized as a tough negotiator with extensive knowledge of the casino industry (T2037-2038).

Both Gerace and Materio were described by three members of the Union as always being helpful and recep-

tive to the Union membership and as having unquestioned reputations for honesty.

Father Vincent Pasquale, a Catholic priest and director of the Alcoholic Council Service, testified that Gerace has an untarnished reputation for honesty and integrity.

As for the business associations, John Rich of the Bricklayers Union, who is also president of the Building Trades Council of Atlantic and Cape May Counties, said that Toro Construction is a large and well-run business, and "a contractor that bids legitimately for legitimate jobs" (T2216; *see also,* T2217-2218). Rich also said Toro was one of four or five union contractors he recommended to Gerace for the headquarters renovation job. The job was apparently awarded by bid (T1693), and there is no reason to question the *bona fides* of the building process or of the cost of the renovations.

As to Affiliated Leasing, Robert Wayne testified that the vehicle leases were entirely legitimate.

With regard to the other two business associations, Casale and Sausto, there is likewise no evidence of impropriety.

In summary, there has been no reliable or substantial evidence before this Commission of any influence, any impropriety, or any crime.

In fact the majority so states:

> It is true that no direct evidence was presented during these proceedings that any of the appointments or business associations resulted from Scarfo's influence and that in a few instances, such as Toro Construction, there is some contrray evidence.

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> We are also aware that the record is silent as to whether any of the Scarfo-related appointees have acted illegally or otherwise impropery in the conduct of the Local's affairs or that any of the business associations were other than legitimate.

While an association between Gerace, Materio and Scarfo, *et al.* has been established, there is no proof anywhere in this proceeding that any of the appointees has conducted any Union business in a manner violative of the law, or contrary to the best interests of the membership of Local 54, or that any of the business transactions were in any way improper. Nor is there anything else that would clearly indicate the fact of influence.

Given these facts and these conclusions, by what stretch of logic does the majority determine that any of these assocations is "inimical" to the policy of the Casino Control Act or gaming activities in New Jersey?

The conclusion one must reach is that the majority believes that while the Scarfo influence on Local 54 cannot be proved by hard evidence today, there is always the possibility that his association with Gerace and Materio could be "inimical" at some point in the future. If this is the logic of the disqualification order, it is based upon an abandonment of American democratic traditions.

Are we to condemn an innocent individual today, because at some distant future time, he *may* commit an impropriety?

The Casino Control Act states:

> An integral and essential element of the regulation and control of casino facilities by the State rests in

> the public confidence and trust in the credibility and integrity of the regulatory process. [N.J.S.A. 5:12-(b)(6)]

If this Commission employs the faulty premise of guilt-by-association, discards the traditional presumption of innocence, and condemns on the testimony of faceless, unexamined informers, we will do more than undermine the credibility and integrity of the regulatory process.

We will do violence to the credibility and integrity of the democratic process.

Finally, I agree with the majority that no inferences can or should be drawn from Gerace's failure to testify. Gerace has a right to remain silent, a right which the Supreme Court has described as an "essential mainstay" of our Constitutional system, *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) and, based on the record before us, I do not think his constitutionally-protected silence should be given any evidential significance.

In its reply brief (page 9), the Division argues that Gerace's answers to the following questions would clearly indicate the extent of any Scarfo influence:

> Who would know whether or not meetings or phone calls with Scarfo ever took place?
>
> Who would know why such contacts occurred and what was discussed on each occasion?
>
> Who would know whether such contacts had any influence on the policies or actions of Local 54, and whether they presented any danger to the casino gaming industry?

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And then the Division reasons:

> The answer to all these questions is that Frank Gerace would know, but he refuses to answer questions on these topics, contending that to do so would incriminate him.

The Division is correct in posing these questions but less than persuasive in reaching such a conclusion in its reply brief.

The fact is that Gerace did testify for four days at a deposition conducted by the Division. The deposition testimony was taken under a grant of immunity, *see,* N.J.S.A. 5:12-67, and the transcript was sealed.

Thus, this Commission has had no access to, and therefore has no knowledge of Gerace's deposition testimony. *But, the Division knows how Gerace answered every question posed to him during that deposition* and could easily have procured his testimony for the Commission's consideration by making another request for immunity, which the Commission obviously would have granted. Our ability to afford all parties a full and fair hearing would have been greatly enhanced if the Division had requested immunity and thus, provided us with Gerace's testimony.

Karlos LaSane

I endorse much of the majority's opinion with regard to LaSane. However, I would reach a different conclusion concerning his rehabilitation.

LaSane was convicted on May 21, 1973. This is his only criminal offense in a life spanning fifty years. LaSane testified that he served one year and twenty-one days for the

offense and was released sometime in 1975 (T329). He also testified that he successfully completed his parole approximately two years later (T330).

Since that time, LaSane has been free of criminal involvement. LaSane testified that following his release from prison he became employed as a counsellor with the Narcotic Addicts Rehabiltation Center Organization (NARCO) (T322), and that he worked for this organization for four years (T324).

LaSane was then employed by the Atlantic Housing Development Corporation as a field representative (T325). He stated that this program was funded by the federal government and when the funds dried up he became employed with the American Civil Liberties Union (T324).

Following his employment with the ACLU, LaSane collected unemployment (T325). Then, in May 1981, he commenced his present employment with Local 54. Furthermore, as the majority notes, seven members of the Atlantic City community have indicated their support for LaSane and offered their opinion that he is a man of honesty and integrity.

I find that the singularity of the offense, although admittedly a serious crime, the nearly continuous work record since his release, and the contemporaneous, uncontradicted statements made on his behalf, indicate that LaSane does not warrant so harsh a penalty as the majority prescribes. I would find that LaSane is rehabilitated and I woul waive his disqualification pursuant to section 93(b).

Appendix D

Conclusion

For all of the above reasons, I find that the Division has not proven that Gerace and Materio are disqualified under section 86(f) or that LaSane is disqualified under section 86(c).

Commissioner Thomas joins Commissioner Jacobson's opinion with regard to Karlos LaSane.

APPENDIX E

Order of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

September 28, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION NO. 54

This matter having been opened to the Commission by the Division of Gaming Enforcement, Robert Sturges, Acting Director, appearing, and Bernard N. Katz, Esq., Meranze, Katz, Spear & Wilderman, Esqs., having appeared on behalf of Hotel and Restaurant Employees and Bartenders International Union Local 54, and Ronald F. Kidd, Esq., Duane, Morris, Heckscher, Esqs., having appeared on behalf of Frank Gerace, and the Commission having held a hearing, and having found that Frank Gerace and Frank Materio are disqualified under N.J.S.A. 5:12-86(f), and that Karlos LaSane is disqualified under N.J.S.A. 5:12-86(c), and good cause having been shown,

It is on this 28th day of September, 1982, Ordered that: Frank Gerace, Frank Materio and Karlos LaSane

be removed as officers, agents or principal employees of Hotel and Restaurant Employees and Bartenders International Union Local 54 by October 12, 1982; and

FURTHER ORDERED that: In the event Frank Gerace, Frank Materio or Karlos LaSane is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will hereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent; and

FURTHER ORDERED that: By October 5, 1982, the parties shall submit briefs in accordance with the terms of the opinion issued this day by the Commission.

NEW JERSEY CASINO CONTROL COMMISSION

By:

DON M. THOMAS, Acting Chairman

MARTIN B. DANZIGER, Commissioner

CARL ZEITZ, Commissioner

MADELINE H. MCWHINNEY, Commissioner

APPENDIX F

Supplemental Opinion of New Jersey Casino Control Commission

STATE OF NEW JERSEY
CASINO CONTROL COMMISSION

Docket No. 81-LO-1

October 12, 1982

In the Matter of

THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION NO. 54

NEW JERSEY CASINO CONTROL COMMISSION

Don M. Thomas, Acting Chairman
Joel R. Jacobson, Commissioner
Madeline H. McWhinney, Commissioner
Carl Zeitz, Commissioner

APPEARANCES:

For the Casino Control Commission:

John R. Zimmerman, Senior Assistant Counsel
Timothy J. O'Neill, Assistant Counsel

Appendix F

For the Division of Gaming Enforcement:

Robert B. Sturges, Acting Director
James F. Flanagan, III, Deputy Director
Gary A. Ehrlich, Deputy Attorney General
Mitchell A. Schwefel, Deputy Attorney General
Eugene M. Schwartz, Deputy Attorney General

For Local 54:

Bernard N. Katz, Esq.
Michael Katz, Esq.
Meranze, Katz, Spear & Wilderman, Esqs.

For Frank Gerace:

Ronald F. Kidd, Esq.
Duane, Morris, Heckscher, Esqs.

Section 93 of the Casino Control Act provides that any labor organization which seeks to represent persons licensed or registered under the Act and employed by a casino hotel or casino licensee must register annually with this Commission. N.J.S.A. 5:12-93(a). Hotel and Restaurant Employees and Bartenders International Union Local 54 represents approximately 14,000 waiters, kitchen workers, bartenders, porters and other hotel workers, the large majority of whom are employed in the casino hotels in Atlantic City and are licensed by or registered with the Commission. Thus, the Union is required to register under section 93, and it has done so.

Section 93 further provides:

b. No labor organization, union or affiliate registered or required to register pursuant to this sec-

> tion and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. [N.J.S.A. 5:12-86].

The Division of Gaming Enforcement filed letter reports with the Commission alleging that certain officers, agents or principal employees of Local 54 were disqualified under section 86. Following a hearing, the Commission issued an opinion in which it found that three such persons were in fact disqualified, one because of his criminal record (sections 86(c)), and two because of their organized crime associations (section 86(f)). Therefore, on September 28, 1982, the Commission issued an order requiring Local 54 to remove the three individuals as officers, agents or principal employees by October 12, 1982. The order further provided that if any of these persons remained an officer, agent or principal employee as of October 12, Local 54 would thereafter be prohibited from receiving dues from any employee licensed or registered under the Act and employed by a casino licensee or its agent. Finally, the order required the parties to file briefs by October 5, 1982, addressing the interpretation and applicability to this case of the additional statutory prohibitations against "administ[ration of] any pension or welfare funds.." Specifically, the parties were directed to discuss what discretion the Commission may exercise in regard to the remedial provisions of section 93(b), whether cessation of dues collection and cessation of administration of

pension and welfare funds are alternative remedies, and whether in fact Local 54 is engaged in the administration of pension or welfare funds. On this last point the parties were permitted to make whatever written factual submissions they deemed appropriate.

In its brief the Division argues that the Commission has the discretion to utilize either one or both of the section 93(b) remedies, depending on the facts of the particular case before it. As to the present case, the Division asserts that, due to Local 54's refusal to cooperate in its investigative efforts, it lacks sufficient information to determine if Local 54 administers pension or welfare funds within the meaning of section 93(b) and the regulations adopted pursuant thereto. The Division suggests that a supplemental hearing be held in order to determine whether Local 54 administers pension and welfare funds and, if so, whether the Commission should take any remedial action in this regard.

Local 54 did not comply with the Commission's order to file a brief on these issues.

In construing section 93(b) we must bear in mind that "the purpose of construction is to bring the operation of the statute within the apparent intention of the Legislature." *Sperry and Hutchinson Co.* v. *Margetts,* 15 N.J. 203, 209 (1954). "[T]he words in a statute must be interpreted in context to serve the spirit of the law," *Bd. of Education, Asbury Park* v. *Hoek,* 38 N.J. 213, 231 (1962), and ultimately "[i]t is not the words but the internal sense of the law that controls." *Wollen* v. *Fort Lee,* 27 N.J. 408, 418 (1958); *accord, Riccio* v. *N.J. Mfrs. Ins. Co.,* 179 N.J. Super. 65, 70, (App. Div. 1981); *Newark* v. *Dept. of Civil Service,* 68 N.J. Super. 416, 428 (App. Div. 1961). As stated in *N.J. Builders, etc. Ass'n* v. *Blair,* 60 N.J. 330, 338 (1972):

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> In reading and interpreting a statute, primary regard must be given to the fundamental purpose for which the legislation was enacted. Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter.

In determining te legislative intent behind section 93(b) we must consider the legislative history of this section, *State* v. *Madden*, 61 N.J. 377, 389 (1972); *In Re Meadowlands Communications Systems, Inc.*, 175 N.J. Super. 53, 65 (App. Div. 1980), *certif. den.* 85 N.J. 455 (1980), and must also read this section in the context of the Act as a whole. *Seatrain Lines, Inc.* v. *Medina*, 39 N.J. 222, 226 (1963); *Petition of Scheffeld Farms Co.*, 22 N.J. 548, 554 (1956).

The purpose of section 93(b) is clearly revealed in the legislative history. Prior to the enactment of the Casino Control Act, the Commission of Investigations of the State of New Jersey advised the Legislature that the casino industry would be a "vulnerable target for criminal intrusion" and that there were "few better vehicles" for organized crime to gain a stronghold in the industry than control of labor unions. *Report and Recommendations on Casino Gambling by the Commission of Investigations of the State of New Jersey* (1977), at 1-H. The Commission of Investigations recommended that labor union officials be subject to disqualification criteria, and explained:

> The provision is intended to exclude members of organized crime and other unsavory individuals from effecting [*sic*] the casino industry through labor organizations. [*Id.* at 2-H].

Similarly, the *Second Interim Report of the Governor's Staff Policy Group on Casino Gambling* (1977), recommended that the Casino Control Act contain disqualification provisions for officials of casino industry labor unions, and stated:

> Without interfering with legally protected organizational or bargaining activities, the state must assure that these activities are conducted by individuals of integrity. [*Id.* at 46].

Of course, the recommendations of the Commission of Investigations and the Staff Policy Group were followed and section 93 was adopted. We have no doubt that the purpose of section 93 is to prevent persons disqualified under the section 86 criteria from utilizing labor unions as a means of gaining a foothold in the casino industry. It is equally clear that the purpose of the section 93(b) remedies is to give the Commission the means to effect the removal of disqualified persons from positions of authority within labor unions. In order that the legislative intent can best be carried out the Commission must have the discretion to use the section 93(b) remedies either separately or in conjunction, as may be necessary to insure the removal of disqualified persons in a given case.

Our conclusion that we have discretion in applying the section 93(b) remedial provisions is buttressed by reading this section in the context of the Casino Control Act as a whole. The Legislature has provided that the Commission "may exercise any proper power or authority necessary to perform the duties assigned to it by law," and that "no specific enumeration of powers in this Act shall be read to limit the authority of the Commission to administer this Act." N.J.S.A. 5:12-75. Indeed, in

denying Local 54's motion to preliminarily enjoin the Commission from enforcing sections 93 and 86 against the Union, Judge Brotman recognized that the Commission would have discretion in fashioning a remedy if it found any officer, agent or principal employee of Local 54 to be disqualified. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger (sic), et al.*, 536 F. Supp. 317, 330 (D.N.J. 1982).

In summary, we conclude that the Legislature intended to invest the Commission with broad discretion in the administration of the section 93(b) remedies, so as to enable the Commission to achieve the purposes of section 93 without unnecessarily interfering with the legitimate rights of union members. Specifically, we conclude that the section 93(b) sanctions can be applied singly or jointly, depending on the facts and circumstances of a given case. In the present case we have ordered the removal of three union officials and have made it clear that failure to heed this order will result in a prohibition against dues collection. At present we think this action is sufficient to effect the removal of the disqualified persons and we see no need to invoke the pension and welfare fund provisions of section 93(b). In addition, we are not in a position to invoke those provisions, not having held a hearing or made findings about Local 54's pension and welfare fund activities and the effect that our curtailment of those activities might have on the union membership. In view of the fact that the United States District Court has enjoined the Commission, pending appeal, from enforcing section 93 against Local 54, we have no immediate plans to hold such a hearing.

Appendix F

NEW JERSEY CASINO CONTROL COMMISSION
By:
DON M. THOMAS, Acting Chairman
MADELINE H. MCWHINNEY, Commissioner
CARL ZEITZ, Commissioner

Dated: October 12, 1982.

Appendix F

SEPARATE OPINION OF COMMISSIONER JACOBSON

I have decided, after considerable thought, not to sign the foregoing majority opinion.

It is not that I disagree with the legal analysis or legal conclusions contained in the opinion with regard to the statutory construction of section 93. I do, however, disagree with the majority's predecessor opinion in this matter and I am therefore disinclined to join an opinion which, in my view, implicitly endorses the earlier decision.

JOEL R. JACOBSON
Commissioner

APPENDIX G

Judgment of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

Entered June 6, 1983

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

On Appeal From The United States District Court
For The District Of New Jersey

Present: Gibbons, Higginbotham and Becker, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 15, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 22, 1982 and appealed at No. 82-5210 be, and the same is hereby reversed and the cause remanded to the said District Court for the entry of an order enjoining the Commission and the Division from taking any action, pending final hearing to enforce section 93 against the Union. It is further ordered and

adjudged that the cross appeals, Nos. 82-5234 and 82-5260, are dismissed for lack of jurisdiction. Costs taxed against appellees in No. 82-5210; costs taxed against appellants in Nos. 82-5234 and 82-5260.

Attest:

Sally Mavos
Clerk

June 6, 1983

APPENDIX H

Order on Rehearing of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

Entered June 30, 1983

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

Appendix II

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

SUR PETITION ON REHEARING

Present: Seitz, *Chief Judge*,

Aldisert, Adams, Gibbons, Hunter, Weis, Garth Higginbotham, Sloviter and Becker, *Circuit Judges.*

The petitions for rehearing filed by appellants Casino Control Commission, et al. and Division of Gaming Enforcement, et al. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix H

Judges Hunter, Weis, Garth, Sloviter and Becker would grant rehearing. A statement by Judge Adams Sur Petition for Rehearing is attached.

By the Court,

JOHN J. GIBBONS
Judge

Dated: June 30, 1983

ADAMS, Circuit Judge, statement sur petition for rehearing.

This appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. The decision by this Court not to rehear this matter *in banc*, should not be taken as a sign that it considers the matter unworthy of careful scrutiny by the full Court. Rather, I believe that the determination not to consider this case *in banc* may be understood as an acknowledgement of the thorough discussions set forth in the majority and dissenting opinions which have laid out the arguments for each side in considerable detail.

Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance by the nation's highest tri-

bunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX I

Notices of Appeal to Supreme Court of the United States

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants
and Cross-Appellees,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMIS-

---

SIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees
and Cross-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; and Thomas Kean, Governor, State of New Jersey, the Defendants-Appellees/Cross-Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered on June 6, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

IRWIN I. KIMMELMAN
Attorney General of New Jersey

Appendix I

By: GARY A. EHRLICH
Deputy Attorney General

Attorneys for Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey et al.

Richard J. Hughes Justice Complex
25 Market Street
CN-047
Trenton, New Jersey 08625
(609) 292-9394

Dated: July 18, 1983

Received and Filed
July 20, 1983
Sally Mrvos, Clerk
United States Court of
Appeals for the Third Circuit

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 5234, 5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants
and Cross-Appellees,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF

Appendix I

LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees
and Cross-Appellants.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

AFFIDAVIT OF SERVICE

GARY A. EHRLICH, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a Deputy Attorney General of the State of New Jersey, and I represent the Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey et al. in connection with the above-entitled matter.

2. On the 18th day of July, 1983, I caused to be served a true copy of the Notice of Appeal to the Supreme Court of the United States annexed hereto by depositing the same in the United States Post Office in the Richard J. Hughes Justice Complex, 25 Market Street, Trenton, New Jersey, with first-class postage prepaid, addressed to the following attorneys:

Appendix I

Bernard N. Katz, Esq.
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Robert J. Genatt, Esq.
General Counsel
New Jersey Casino Control
Commission, et al.
3131 Princeton Pike
Building No. 5
CN-208
Trenton, New Jersey 08625

3. The attorneys named in paragraph (2) hereof represent all other parties who appeared in the above-entitled matter before the United States Court of Appeals for the Third Circuit, thus all parties required to be served have been served.

GARY A. EHRLICH
Deputy Attorney General

Sworn and subscribed to
before me this 18th day of July,
1983.

MITCHELL A. SCHWEFEL
An Attorney-at-Law of the
State of New Jersey

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants/
Cross-Appellees

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAM-

---

ING ENFORCEMENT, STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY.

Defendants-Appellees/
Cross-Appellants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of New Jersey, Casino Control Commission, the Defendants-Appellees/Cross-Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered on June 6, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

ROBERT J. GENATT, General Counsel
New Jersey Casino Control Commission

By JOHN R. ZIMMERMAN
Senior Assistant Counsel

Attorney for State of New Jersey,
Casino Control Commission

Princeton Pike Office Park
Building No. 5, CN-208
Trenton, New Jersey 08625
(609) 292-7584

Dated: August 3, 1983

Received and Filed
July 20, 1983
Sally Mrvos, Clerk
United States Court of
Appeals for the Third Circuit

Appendix I

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 82-5210, 82-5234 and 82-5260

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Plaintiffs-Appellants/
Cross-Appellees

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 331,

Intervenor,

vs.

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAM-

---

ING ENFORCEMENT, STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Defendants-Appellees/
Cross-Appellants

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } SS.:

AFFIDAVIT OF SERVICE

JOHN R. ZIMMERMAN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a Senior Assistant Counsel with the New Jersey Casino Control Commission and I represent the Commission in the above entitled matter.

2. On August 2, 1983, I caused to be mailed a true copy of the Notice of Appeal to the Supreme Court of the United States annexed hereto to the following, via regular United States mail:

Bernard N. Katz, Esq.
MERANZE, KATZ, SPEAR & WILDERMAN
1200 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Appendix I

Thomas R. O'Brien, Director
Division of Gaming Enforcement
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

3. The attorneys named in paragraph (2) hereof represent all other parties who appeared in the above-entitled matter before the United States Court of Appeals for the Third Circuit, thus all parties required to be served have been served.

John R. Zimmerman

Sworn and Subscribed to
before me this 2nd day of
August, 1983.

Timothy O'Neill
An Attorney at Law of New Jersey

APPENDIX J

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976)

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), entitled "Right of employees as to organization, collective bargaining, etc.," provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

APPENDIX K

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976)

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), entitled "Prohibition against certain persons holding office," provides:

> (a) Membership in Communist Party; persons convicted of robbery, bribery, etc.
>
> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> (1)as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or
>
> (2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,
>
> during or for five years after the termination of his membership in the Communist Party, or for

five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Penalty for violations

Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Definitions

For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

APPENDIX L

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976)

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), entitled "Persons prohibited from holding certain positions," provides:

> (a) Conviction or imprisonment
>
> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is

the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice to such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

(b) Penalty

Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Definitions

For the purposes of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

APPENDIX M

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of January 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983)

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of January 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), entitled "Other laws," provides:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established

under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev.Stat. §§393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health

Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph(A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action

having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX N

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984)

New Jersey Statutes Annotated §5:12-93 (West Supp. 1983-1984), entitled "Registration of labor organizations," provides:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually, and shall disclose such information to the commission as the commission may require, including the names of all affiliated organizations, pension and welfare systems and all officers and agents of such organizations and systems; provided, however, that no labor organization, union, or affiliate shall be required to furnish such information to the extent such information is included in a report filed by any labor organization, union, or affiliate with the Secretary of Labor pursuant to 29 U.S.C. §§ 431 et seq. or 1001 et seq. if a copy of such report, or of the portion thereof containing such information, is furnished to the commission pursuant to the aforesaid federal provisions. The commission may in its discretion exempt any labor organization, union, or affiliate from the registration requirements of this subsection where the commission finds that such organization, union or affiliate is not the certified bargaining representative of any employee licensed or registered under this act, is not involved actively, directly or substantially in the control or direction of the representation of any such employee, and is not seeking to do so.

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b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

c. Neither a labor organization, union or affiliate nor its officers and agents not otherwise individually licensed or registered under this act and employed by a casino licensee may hold any financial interest whatsoever in the casino hotel or casino licensee whose employees they represent.

APPENDIX O

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984)

New Jersey Statutes Annotated §5:12-86 (West Supp. 1983-1984), entitled "Casino license—disqualification criteria," provides:

> The commission shall deny a casino license to any applicant who is disqualified on the basis of any of the following criteria:
>
> a. Failure of the applicant to prove by clear and convincing evidence that the applicant is qualified in accordance with the provisions of this act;
>
> b. Failure of the applicant to provide information, documentation and assurances required by the act or requested by the commission, or failure of the applicant to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;
>
> c. The conviction of the applicant, or of any person required to be qualified under this act as a condition of a casino license, of any offense in any jurisdiction which would be under New Jersey law at the time of application a violation of any of the following provisions of law:
>
> (1) With respect to convictions obtained pursuant to the "New Jersey Code of Criminal Justice," P.L.1978, c. 95 (Title 2C of the New Jersey Statutes) as amended and supplemented:

all crimes of the first degree;

N.J.S. 2C:5-1 (attempt to commit an offense which is listed in this paragraph);

N.J.S. 2C:5-2 (conspiracy to commit an offense which is listed in this paragraph);

N.J.S. 2C:11-4b. (manslaughter);

N.J.S. 2C:12-1b. (aggravated assault which constitutes a crime of the second or third degree);

N.J.S. 2C:15-1 (robberies);

N.J.S. 2C:17-1a. and b. (crimes involving arson and related offenses);

N.J.S. 2C:17-2a. and b. (causing or risking widespread injury or damage);

N.J.S. 2C:18-2 (burglary which constitutes a crime of the second degree);

N.J.S. 2C:20-1 et seq. (theft and related offenses which consitute crimes of the second and third degrees);

N.J.S. 2C:20-7 (receiving stolen property);

N.J.S. 2C:21-1 et seq. (forgery and fraudulent practices which constitute crimes of the second and third degrees);

N.J.S. 2C:21-4a (falsifying or tampering with records);

N.J.S. 2C:21-14 (receiving deposits in a failing financial institution);

N.J.S. 2C:27-1 et seq. (bribery and corrupt influence);

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N.J.S. 2C:28-1 et seq. (perjury and other falsification in official matters which constitutes a crime of the third and fourth degrees);

N.J.S. 2C:30-2 and N.J.S. 2C:30-3 (misconduct in office and abuse in office which constitutes a crime of the second degree);

N.J.S. 2C:37-1 et seq. (gambling offenses which constitute crimes of the third and fourth degrees);

N.J.S. 2C:37-7 (possession of a gambling device);

(2) With respect to convictions obtained under Title 2A of the New Jersey Statutes:

N.J.S. 2A:85-5 (attempt to commit an offense with is in this paragraph);

N.J.S. 2A:89-1 et seq. (arson and other burnings);

N.J.S. 2A:90-1 et seq. (assault and battery);

N.J.S. 2A:91-1 et seq. (banks and financial corporations);

N.J.S. 2A:93-1 (bribery of judge or magistrate; acceptance of bribe);

N.J.S. 2A:93-2 (bribery of legislators; acceptance by legislators or other persons);

N.J.S. 2A:93-4 (soliciting or receiving award for official vote);

N.J.S. 2A:93-6 (giving or accepting bribes in connection with government work, service, etc.);

N.J.S. 2A:93-10 (giving or promising bribe to participants in sporting contest);

Appendix O

N.J.S. 2A:93-13 (giving or promising bribe to referee, umpire or other official in sporting contest);

N.J.S. 2A:94-1 (breaking and entering or entering);

N.J.S. 2A:94-2 (use of high explosives in breaking or entering);

N.J.S. 2A:98-1 (conspiracy to commit an offense which is enumerated in this paragraph);

N.J.S. 2A:99-1 (obstructing execution of process; assaulting officers);

N.J.S. 2A:102-1 et seq. (embezzlement, conversion and misappropriation);

N.J.S. 2A:103-1 et seq. (embracery);

N.J.S. 2A:105-1 et seq. (extortion, threats and unlawful takings);

N.J.S. 2A:108-9 (narcotic drugs; persuading others to use);

N.J.S. 2A:109-1 to N.J.S. 2A:109-3, N.J.S. 2A:109-6 to N.J.S. 2A:109-9 (forgery and counterfeiting);

N.J.S. 2A:111-1 to N.J.S. 2A:111-3, N.J.S. 2A:111-5 to N.J.S. 2A:111-15, N.J.S. 2A:111-18 to N.J.S. 2A:111-21.1, N.J.S. 2A:111-23 and N.J.S. 2A:111-24, N.J.S. 2A:111-28 to N.J.S. 2A:111-32, N.J.S. 2A:111-34 to N.J.S. 2A:111-35, N.J.S. 2A:111-37 to N.J.S. 2A:111-46 (frauds and cheats);

N.J.S. 2A:112-1 et seq. (gaming);

N.J.S. 2A:113-1 (murder);

N.J.S. 2A:113-5 (manslaughter);

N.J.S. 2A:114-2 (incestuous conduct between parent and child);

N.J.S. 2A:118-1 et seq. (kidnapping);

N.J.S. 2A:119-1 to N.J.S. 2A:119-5, P.L. 1965, c. 52 (C. 2A:119-5.1 et seq.) (larceny and other stealings);

N.J.S. 2A:119-8 (stealing narcotic drugs; breaking and entering with intent to steal);

P.L.1968, c. 349 (C. 2A:119A-1 et seq.) (loansharking);

N.J.S. 2A:121-1 et seq. (lotteries);

N.J.S. 2A:125-1 et seq. (mayhem);

N.J.S. 2A:131-1 to N.J.S. 2A:131-3 (perjury and subornation of perjury);

N.J.S. 2A:135-3 (public officers or employees unlawfully obtaining state, county, municipal or school district funds);

N.J.S. 2A:138-1 et seq. (rape and carnal abuse);

N.J.S. 2A:139-1 et seq. (receiving stolen property);

N.J.S. 2A:141-1 (robbery);

N.J.S.2A:143-2 (sodomy with children under 10);

P.L.1957, c. 49 (C. 2A:148-22.1) (giving false information to law enforcement officer or agency);

(3) any high misdemeanor under section 19 of P.L.1970, c. 226 (C. 24:21-19) or

(4) any other offense which indicates that licensure of the applicant would be inimical to the policy of this act and to casino operations; provided, however, that the automatic disqualification provisions of this subsection shall not apply with regard to any conviction which did not occur within the 10-year period immediately preceding application for licensure and which the applicant demonstrates by clear and convincing evidence does not justify automatic disqualification pursuant to this subsection and any conviction which has been the subject of a judicial order of expungement or sealing and provided, further however, that, any applicant or any person required to be qualified under this act as a condition of a casino license who is disqualified on the basis of paragraph (2) herein shall not be so disqualified if such applicant or person demonstrates to the commission by clear and convincing evidence that the act or acts which constitute the offense which forms the basis for such disqualification would not form the basis for a disqualification pursuant to paragraph (1) of this section;

d. Current prosecution or pending charges in any jurisdiction of the applicant or of any person who is required to be qualified under this act as a condition of a casino license, for any of the offenses enumerated in subsection c. of this section; provided, however, that at the request of the applicant or the person charged, the commission shall defer decision upon such application during the pendency of such charge;

e. The pursuit by the applicant or any person who is required to be qualified under this act as a condition of a casino license of economic gain in an occupational manner or context which is in violation of the criminal or civil public policies of this State, if such pursuit creates a reasonable belief that the participation of such person in casino operations would be inimical to the policies of this act or to legalized gaming in this State. For purposes of this section, occupational manner or context shall be defined as the systematic planning, administration, management, or execution of an activity for financial gain;

f. The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders;

g. The commission by the applicant or any person who is required to be qualified under this act as a condition of a casino license of any act or

acts which would constitute any offense under subsection c. of this section, even if such conduct has not or may not be prosecuted under the criminal laws of this State; and

h. Contumacious defiance by the applicant or any person who is required to be qualified under this act of any legislative investigatory body or other official investigatory body of any state or of the United States when such body is engaged in the investigation of crimes relating to gaming, official corruption, or organized crime activity.

NO. 498
NO. 573 (Consolidated)

Office - Supreme Court, U.S.
FILED
JAN 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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* Counsel of Record

Appeal Docketed in No. 498 on September 23, 1983.
Appeal Docketed in No. 573 on September 26, 1983.
Probable Jurisdiction noted on November 28, 1983.

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APPENDIX:

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C—Amended Complaint 20a

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The following opinions, judgments, orders and decisions have been omitted in printing this appendix because they appear in the appendix to the printed Jurisdictional Statements on the following pages:

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The following statutory provisions have also been omitted in printing this appendix because they appear in the appendix to the printed Jurisdictional Statements on the following pages:

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976)..... 235a

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976).... 236a

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The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of January 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983)..... 241a

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APPENDIX A

Chronological List of Relevant Docket Entries

August 17, 1981—Complaint and motion for preliminary injunction of Plaintiffs, Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, filed in U.S. District Court for District of New Jersey.

October 6, 1981—Plaintiffs' amended complaint filed.

December 10, 1981—Answer and motion for dismissal on abstention grounds of Defendants Martin Danziger *et al.*, constituting the N.J. Casino Control Commission, filed.

December 11, 1981—Answer of Defendants G. Michael Brown, Director, N.J. Department of Law and Public Safety, Division of Gaming Enforcement, Division of Gaming Enforcement and Brendan Byrne, former Governor of N.J. filed.

February 25, 1982—Motion for dismissal on abstention grounds of Defendants Brown, Division of Gaming Enforcement and Byrne filed.

March 22, 1982—Opinion filed and order entered by District Court denying Plaintiffs' motion for preliminary injunction and Defendants' motions for dismissal on abstention grounds.

March 31, 1982—Plaintiffs' notice of appeal filed.

April 12, 1982—Notice of Cross-Appeal of Defendants Danziger *et al.* and Casino Control Commission filed.

Appendix A

April 22, 1982—Notice of Cross-Appeal of Defendants Brown, Division of Gaming Enforcement and Thomas Kean, Governor, filed.

September 28, 1982—Opinion filed and order entered by Casino Control Commission following administrative hearing, directing that certain individuals disqualified under N.J. law be removed as officers, agents or principal employees of Plaintiff union or, in the alternative, that sanctions be imposed upon Plaintiffs.

October 1, 1982—Order entered by District Court enjoining Defendants from enforcing applicable state statute and administrative decision against Plaintiffs pending appeal.

October 12, 1982—Supplemental opinion filed by Casino Control Commission.

June 6, 1983—Opinion and judgment of Court of Appeals for the Third Circuit.

June 30, 1983—Order of Court of Appeals denying Defendants' petitions for rehearing.

July 20, 1983—Notice of Appeal of Defendants Brown, Division of Gaming Enforcement and Kean filed.

August 3, 1983—Notice of Appeal of Defendants Danziger *et al.* and Casino Control Commission filed.

September 23, 1983—Appeal of Defendants Brown, Division of Gaming Enforcement and Kean docketed.

Appendix A

September 26, 1983—Appeal of Defendants Danziger *et al.* and Casino Control Commission docketed.

November 28, 1983—Order entered noting probable jurisdiction and consolidating appeals of all Defendants.

APPENDIX B

Verified Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, 200 N. Texas Avenue, Atlantic City, N. J. 08401

and

FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, 200 N. Texas Avenue, Atlantic City, N. J. 08401

vs.

MARTIN DANZINGER, ACTING CHAIRMAN, DONALD THOMAS, COMMISSIONER, MADELINE McWHINNEY, COMMISSIONER, CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION STATE OF NEW JERSEY, Princeton Pike Office Park, Bldg. #5, CN-208, Trenton, N. J. 08625

and

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF GAMING ENFORCEMENT STATE OF NEW JERSEY, CN-047, Trenton, N. J. 08625

Appendix B

and

DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, CN-047, Trenton, N. J. 08625

and

BRENDAN BYRNE, GOVERNOR, STATE OF NEW JERSEY, STATE HOUSE ANNEX, Trenton, N. J. 08625

Civil Action No. 81-2630

COMPLAINT

The Parties:

1. Plaintiffs in this action are Hotel and Restaurant Employees and Bartenders International Union Local 54, an unincorporated labor organization within the meaning of the National Labor Relations Act of 1947, as amended, 29 U.S.C. 141 *et seq*, with its principal office located at 200 N. Texas Avenue, Atlantic City, N.J. 08401, and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, with his principal office located at the same address. Plaintiffs bring this action on their own behalf and on behalf of all officers, agents, and principal employees of said Union and on behalf of all members of said Union who are employed within the Casino and Casino Hotel Industry in Atlantic City, New Jersey.

2. Defendants, Martin Danzinger, Donald Thomas, Madeline McWhinney, and Carl Zeitz, constitutes the New Jersey Casino Control Commission, an administrative agency created by the New Jersey Casino Control Act NJSA 5:12-1 *et seq,* with its principal office located at Princeton Pike Office Park, CN-208, Trenton, New Jersey 08625.

3. Defendant, G. Michael Brown, is the Director of the New Jersey Division of Gaming Enforcement, a branch of the New Jersey Department of Law and Public Safety created by the New Jersey Casino Control Act, NJSA 5:12-1 *et seq,* with his principal office located at Department of Law and Public Safety, CN-047, Trenton, N.J. 08625.

4. Defendant, Department of Law and Public Safety, Division of Gaming Enforcement, (hereinafter called Division of Gaming Enforcement) is a branch of the New Jersey Department of Law and Public Safety created by the New Jersey Casino Control Act NJSA 5:12-1 *et seq,* with its principal office located at Department of Law and Public Safety, CN-047, Trenton, N.J. 08625.

5. Defendant, Brendan Byrne, is the Chief Executive Officer of the State of New Jersey with his office located at State House Annex, Trenton, N.J. 08625.

Jurisdiction:

6. Jurisdiction is sought pursuant to 28 U.S.C. Section 1331 vesting in this Honorable Court original jurisdiction of all civil actions arising under the Constitution, Laws,

and Treaties of the United States and 28 U.S.C. Section 1337 vesting in this Honorable Court original jurisdiction over all matters arising out of an Act of Congress regulating commerce.

7. In addition, Plaintiff seeks jurisdiction pursuant to the Declaratory Judgment Act 28 U.S.C. 2201 and 2202.

8. Jurisdiction is also sought pursuant to 28 U.S.C. Section 1343 (a) (3) vesting in this Honorable Court original jurisdiction of all actions to redress the deprivation under color of State Law of any rights secured by the Constitution and Laws of the United States.

9. Jurisdiction is also invoked pursuant to 28 U.S.C. Section 1343 (a) (4) providing for original jurisdiction in this Honorable Court to hear actions to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.

Background:

10. Plaintiff, Hotel and Restaurant Employees and Bartenders International Union Local 54 is the duly certified and recognized collective bargaining agent for all waiters, waitresses, bartenders, cooks, kitchen help, housekeeping, and other hotel service related employees within the Casino and Casino Hotel Industry in Atlantic City, New Jersey, all of which said employees are required to be licensed pursuant to the terms of the New Jersey Casino Control Act (NJSA 5:12-1 *et seq*).

11. Defendant, Casino Control Commission, is vested with the statutory authority and duty under the New

Jersey Casino Control Act to administer and enforce the terms of said Act and to promulgate rules and regulations thereunder.

12. Defendant, G. Michael Brown, Director of the New Jersey Division of Gaming Enforcement and Defendant, New Jersey Division of Gaming Enforcement, are vested with the statutory authority and duty under the New Jersey Casino Control Act to conduct investigations pursuant to said Act and to seek enforcement of the terms thereof.

13. Section 93(a) of said Act, NJSA 5:12-93(a) requires all labor organizations and officers and agents thereof seeking to represent employees in the Casino and Casino Hotel Industry to file Registration Statements with the Casino Control Commission as a condition precedent to acting in such a representational capacity.

14. Section 93(b) of said Act (NJSA 5:12-93(b)) bars any labor organization or Union required to be registered under Section 93(a) of said Act from receiving dues from any employee required to be licensed under said Act and employed within the Casino and Casino Hotel Industry and further from administrating any pension and welfare funds if any officer, agent, or principal employee of said labor organization or Union is disqualified pursuant to the terms of Section 86 of said Act (NJSA 5:12-86).

15. Defendants, G. Michael Brown and Division of Gaming Enforcement, within the scope of their official capacity, have filed objections to the Registrations of the Plaintiff Union and certain of its officers based on Section

86 of the New Jersey Casino Control Act and seek to have the Casino Control Commission impose the sanctions set forth in Section 93(b) of said Act.

FIRST COUNT

16. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

17. Section 93 of the New Jersey Casino Control Act attempts to regulate areas which are preempted by the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 141 *et seq* and by the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Section 1001 *et seq*.

18. Accordingly, Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the supremacy and due process clauses of the United States Constitution and the Amendments thereto.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorneys fees and costs of suit; and

(d) Other relief as deemed appropriate.

SECOND COUNT

19. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

20. Section 93 of the New Jersey Casino Control Act is violative of rights of the Plaintiffs created under the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 141 *et seq,* to serve as the duly chosen collective bargaining representative of certain employees in the Casino and Casino Hotel Industry in Atlantic City, New Jersey.

21. The Defendants, acting under color of state law, seek to implement and enforce Section 93 of the New Jersey Casino Control Act and are, accordingly, in violation of 42 U.S.C. Section 1983.

22. Said violation by the Defendants is wilfull and knowing.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(e) Reasonable attorneys fees and costs of suit; and

(f) Other relief as deemed appropriate.

THIRD COUNT

23. Allegations 1 through 15 are incorporated herein as if fully set forth independently.

24. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the rights created by the National Labor Relations Act of 1947 as amended, 29 U.S.C. Section 141 *et seq*, in that said New Jersey Act impermissibly interferes with the rights of those employees in the Casino and the Casino Hotel Industry who have selected the Plaintiff Union as their exclusive collective bargaining agent to make such a choice.

25. As a result of said interference by the New Jersey Act with rights created under the National Labor Relations Act, those employees in the Casino and Casino Hotel Industry who have selected the Plaintiff Union as their exclusive bargaining agent are improperly being denied the effective representation by their duly selected collective bargaining agent.

26. Allegation 21 is incorporated herein as fully as if set forth independently.

27. Said acts by the Defendants are also in violation of the due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution of those employees in the Casino and Casino Hotel Industry who have selected the Plaintiff Union as their exclusive bargaining agent pursuant to their rights under the National Labor Relations Act as amended.

28. Allegation 22 is incorporated herein as fully as if set forth independently.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 93 of the New Jersey Casino Control act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(e) Reasonable attorney's fees and costs of suit; and

(f) Other relief as the Court deemed appropriate.

FOURTH COUNT

29. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

30. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the equal protection clause of the United States Constitution by distinguishing between the labor organizations and employees within the Casino and Casino Hotel Industry in Atlantic City, New Jersey and all other labor organizations and Unionized employees within the State of New Jersey vis a vis the application of rights created by the National Labor Relations Act of 1947, as amended, (29 U.S.C. Section 141 *et seq*).

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

FIFTH COUNT

31. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

32. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of rights created by the First and Fourteenth Amendments of the United States Constitution to the extent that said Act requires the registration of labor organizations seeking to represent employees within the Casino and Casino Hotel Industry.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

SIXTH COUNT

33. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

34. Defendant, Division of Gaming Enforcement and its Director, Defendant, G. Michael Brown, have alleged that certain officers of the Plaintiff Union have violated Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f)).

35. Said Section prohibits persons required to be licensed or registered under the New Jersey Casino Control Act from engaging in certain relationships.

36. Defendant, Division of Gaming Enforcement and its Director, Defendant, G. Michael Brown, seek to have Defendant, Casino Control Commission, disqualify certain officers of the Plaintiff Union pursuant to the terms

of Section 86 (f) of the New Jersey Casino Control Act and based thereon to have Defendant, Casino Control Commission, impose against the Plaintiff Union the sanctions called for by Section 93(b) of said Act.

37. Section 86(f) of the Casino Control Act is unconstitutionally overbroad and violative of rights guaranteed by the First, Fifth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

SEVENTH COUNT

38. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

39. Allegations 34 through 36 are incorporated herein as fully as if set forth independently.

40. Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f) is unconstitutionally vague and violative of rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

EIGHTH COUNT

41. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

42. Allegations 34 through 36 are incorporated herein as fully as if set forth independently.

43. Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f)) violates rights of the officers, agents, and principal employees of the Plaintiff Union which are guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

44. The Defendants, under color of state law, seek to implement and enforce the terms of Section 86(f) of said Act and are thereby in violation of 42 U.S.C. Section 1983.

45. Said violation by the Defendants is wilfull and knowing.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(e) Reasonable attorney's fees and costs of suit; and

(f) Other relief as deemed appropriate.

NINTH COUNT

46. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

47. The Plaintiff, Local 54, currently has collective bargaining agreements with all existing Casinos and Casino Hotels in Atlantic City and serves as the collective bargaining agent for certain classifications of employees at said Casinos and Casino Hotels for purposes of negotiating, administering, and enforcing the terms of said agreements.

48. The Plaintiff Union and said Casinos and Casino Hotels engaged in negotiations and collective bargaining in reaching said agreements pursuant to legal obligations created by Section 8(a)(5), 8(b)(3) and 8(d), of the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 158(a)(5), Section 158(b)(3) and Section 159(d).

49. Said Labor Agreements require the signatory Casinos and Casino Hotels to deduct union dues from employees represented by the Plaintiff Union and to forward said dues and certain employee benefit fund contributions to said Union for its respective Funds.

50. Both in its application and in its enforcement, Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) constitutes an impermissible impairment of the contractual obligations between the Plaintiff Union and said Casinos and Casino Hotels which have been negotiated pursuant to the requirements of the National Labor Relations Act. Said impairment is in violation of Article 1 Section 10 of the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

Appendix B

(a) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of

* * *

APPENDIX C

Amended Complaint

[TITLE OMITTED IN PRINTING.]

AMENDED COMPLAINT.

The Parties:

1. Plaintiffs in this action are Hotel and Restaurant Employees and Bartenders International Union Local 54, an unincorporated labor organization within the meaning of the National Labor Relations Act of 1947, as amended, 29 U.S.C. 141 *et seq.* with its principal office located at 200 North Texas Avenue, Atlantic City, New Jersey 08401, and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, with his principal office located at the same address. Plaintiffs bring this action on their own behalf and on behalf of all officers, agents and principal employees of said Union and on behalf of all members of said Union who are employed within the Casino and Casino Hotel Industry in Atlantic City, New Jersey.

2. Defendants, Martin Danzinger, Donald Thomas, Madeline McWhinney, and Carl Zeitz, constitute the New Jersey Casino Control Commission, an administrative agency created by the New Jersey Casino Control Act NJSA 5:12-1 *et seq.* with its principal office located at Princeton Pike Office Park, CN-208, Trenton, New Jersey 08625.

3. Defendant, G. Michael Brown, is the Director of the New Jersey Division of Gaming Enforcement, a

branch of the New Jersey Department of Law and Public Safety created by the New Jersey Casino Control Act, NJSA 5:12-1 *et seq.* with his principal office located at Department of Law and Public Safety, CN-047, Trenton, New Jersey 08625.

4. Defendant, Department of Law and Public Safety, Division of Gaming Enforcement (hereinafter called Division of Gaming Enforcement) is a branch of the New Jersey Department of Law and Public Safety created by the New Jersey Casino Control Act NJSA 5:12-1 *et seq.* with its principal office located at Department of Law and Public Safety, CN-047, Trenton, New Jersey 08625.

5. Defendant, Brendan Byrne, is the Chief Executive Officer of the State of New Jersey with his office located at State House Annex, Trenton, New Jersey 08625.

Jurisdiction:

6. Jurisdiction is sought pursuant to 28 U.S.C. Section 1331 vesting in this Honorable Court original jurisdiction of all civil actions arising under the Constitution, Laws, and Treaties of the United States and 28 U.S.C. Section 1337 vesting in this Honorable Court original jurisdiction over all matters arising out of an Act of Congress regulating commerce.

7. In addition, Plaintiff seeks jurisdiction pursuant to the Declaratory Judgment Act 28 U.S.C. 2201 and 2202.

8. Jurisdiction is also sought pursuant to 28 U.S.C. Section 1343 (a) (3) vesting in this Honorable Court

original jurisdiction of all actions to redress the deprivation under color of state law of any rights secured by the Constitution and Laws of the United States.

9. Jurisidction is also invoked pursuant to 28 U.S.C. Section 1343 (a) (4) providing for original jurisdiction in this Honorable Court to hear actions to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.

Background:

10. Plaintiff, Hotel and Restaurant Employees and Bartenders International Union Local 54, is the duly certified and recognized collective bargaining agent for all waiters, waitresses, bartenders, cooks, kitchen help, housekeeping, and other hotel service related employees within the Casino and Casino Hotel Industry in Atlantic City, New Jersey, all of which said employees are required to be licensed pursuant to the terms of the New Jersey Casino Control Act (NJSA 5:12-1 *et seq.*).

11. Defendant, Casino Control Commission, is vested with the statutory authority and duty under the New Jersey Casino Control Act to administer and enforce the terms of said Act and to promulgate rules and regulations thereunder.

12. Defendant, G. Michael Brown, Director of the New Jersey Division of Gaming Enforcement and Defendant, New Jersey Division of Gaming Enforcement, are vested with the statutory authority and duty under the New Jersey Casino Control Act to conduct investigations

pursuant to said Act and to seek enforcement of the terms thereof.

13. Section 93(a) of said Act, NJSA 5:12-93(a) requires all labor organizations and officers and agents thereof seeking to represent employees in the Casino and Casino Hotel Industry to file Registration-Statements with the Casino Control Commission as a condition precedent to acting in such a representational capacity.

14. Section 93(b) of said Act (NJSA 5:12-93[b]) bars any labor organizaton or Union required to be registered under Section 93(a) of said Act from receiving dues from any employees required to be licensed under said Act and employed within the Casino and Casino Hotel Industry and further from administrating any pension and welfare funds if any officer, agent, or principal employee of said labor organization or Union is disqualified pursuant to the terms of Section 86 of said Act (NJSA 5:12-86).

15. Defendants, G. Michael Brown and Division of Gaming Enforcement, within the scope of their official capacity, have filed objections to the Registrations of the Plaintiff Union and certain of its officers based on Section 86 of the New Jersey Casino Control Act and seek to have the Casino Control Commission impose the sanctions set forth in Section 93(b) of said Act.

FIRST COUNT

16. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

17. Section 93 of the New Jersey Casino Control Act attempts to regulate areas which are preempted by the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 141, *et seq.* and by the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Section 1001, *et seq.*

18. Accordingly, Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the supremacy and due process clauses of the United States Constitution and the Amendments thereto.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorneys fees and costs of suit; and

(d) Other relief as deemed appropriate.

SECOND COUNT

19. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

20. Section 93 of the New Jersey Casino Control Act is violative of rights of the Plaintiffs created under the National Labor Relations Act of 1947, as amended, 29

U.S.C. Section 141, *et seq.* to serve as the duly chosen collective bargaining representive of certain employees in the Casino and Casino Hotel Industry in Atlantic City, New Jersey.

21. The Defendants, acting under color of state law, seek to implement and enforce Section 93 of the New Jersey Casino Control Act and are, accordingly, in violation of 42 U.S.C., Section 1983.

22. Said violation by the Defendants is wilfull and knowing.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(e) Reasonable attorney's fees and costs of suit; and

(f) Other relief as deemed appropriate.

Appendix C

THIRD COUNT

23. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

24. Section 93 of the New Jersey Casino Control Act and Section 86 as incorporated therein attempt to regulate areas which are preempted by the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Section 401 *et seq.*

25. Accordingly, Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) and Section 86 as incorporated therein (NJSA 5:12-86) are violative of the supremacy and due process clauses of the United States Constitution and the Amendments thereto.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 and Section 86 as incorporated therein of the New Jersey Casino Control Act are void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 and Section 86 as incoproated therein of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

Appendix C

FOURTH COUNT

26. Allegations 1 through 15 are incorporated herein as if fully set forth independently.

27. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the rights created by the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 141 *et seq.* and the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Section 401 *et seq.* in that said New Jersey Act impermissibly interferes wth the rights of those employees in the Casino and the Casino Hotel Industry who have selected the Plaintiff Union and its officers as their exclusive collective bargaining agents to make such a choice.

28. As a result of said interference by the New Jersey Act with rights created under the National Labor Relations Act and the Labor Management Reporting and Disclosure Act, those employees in the Casino and Casino Hotel Industry who have selected the Plaintiff Union and its officers as their exclusive bargaining agents are improperly being denied the effective representation by their duly selected collective bargaining agents.

29. Allegation 21 is incorporated herein as fully as if set forth independently.

30. Said acts by the Defendants are also in violation of the due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution of those employees in the Casino and Casino Hotel Industry, who have selected the Plaintiff Union and its officers as

their exclusive bargaining agents pursuant to their rights under the National Labor Relations Act, as amended and the Labor Management Reporting and Disclosure Act, as amended.

31. Allegation 22 is incorporated herein as fully as if set forth independently.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(e) Reasonable attorney's fees and costs of suit; and

(f) Other relief as the Court deemed appropriate.

FIFTH COUNT

32. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

33. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the equal protection clause

of the United States Constitution by distinguishing between the labor organizations and employees within the Casino and Casino Hotel Industry in Atlantic City, New Jersey and all other labor organizations and Unionized employees within the State of New Jersey, vis-a-vis the application of rights created by the National Labor Relations Act of 1947, as amended, (29 U.S.C. Section 141 *et seq*), and the Labor Management Reporting and Disclosure Act of 1959, as amended, (29 U.S.C. Section 401 *et seq*).

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

SIXTH COUNT

34. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

35. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of rights created by the First

and Fourteenth Amendments of the United States Constitution to the extent that said Act requires the registration of labor organizations seeking to represent employees within the Casino and Casino Hotel Industry.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

SEVENTH COUNT

36. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

37. Defendant, Division of Gaming Enforcement and its Director, Defendant, G. Michael Brown, have alleged that certain officers of the Plaintiff Union have violated Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f)).

38. Said Section prohibits persons required to be licensed or registered under the New Jersey Casino Control Act from engaging in certain relationships.

39. Defendant, Division of Gaming Enforcement and its Director, Defendant, G. Michael Brown, seek to have Defendant, Casino Control Commission, disqualify certain officers of the Plaintiff Union pursuant to the terms of Section 86(f) of the New Jersey Casino Control Act and based thereon to have Defendant, Casino Control Commission, impose against the Plaintiff Union the sanctions called for by Section 93(b) of said Act.

40. Section 86(f) of the Casino Control Act is unconstitutionally overbroad and violative of rights guaranteed by the First, Fifth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

EIGHTH COUNT

41. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

42. Allegations 37 through 39 are incorporated herein as fully as if set forth independently.

43. Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f)) is unconstitutionally vague and violative of rights guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

NINTH COUNT

44. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

45. Allegations 37 through 39 are incorporated herein as fully as if set forth independently.

46. Section 86(f) of the New Jersey Casino Control Act (NJSA 5:12-86(f)) violates rights of the officers, agents,

and principal employees of the Plaintiff Union which are guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

47. The Defendants, under color of state law, seek to implement and enforce the terms of Section 86(f) of said Act and are thereby in violation of 42 U.S.C. Section 1983.

48. Said violation by the Defendants is wilfull and knowing.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) Compensatory damages;

(b) Punitive damages;

(c) A Declaratory Judgment that Section 86(f) of the New Jersey Casino Control Act is void and invalid;

(d) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 86(f) of the New Jersey Casino Control Act;

(e) Reasonable attorney's fees and costs of suit; and

(f) Other relief as deemed appropriate.

TENTH COUNT

49. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

Appendix C

50. The Plaintiff, Local 54, currently has collective bargaining agreements with all existing Casinos and Casino Hotels in Atlantic City and serves as the collective bargaining agent for certain classifications of employees at said Casinos and Casino Hotels for purposes of negotiating, administering, and enforcing the terms of said agreements.

51. The Plaintiff Union and said Casinos and Casino Hotels engaged in negotiations and collective bargaining in reaching said agreements pursuant to legal obligations created by Section 8(a)(5), 8(b)(3) and 8(d), of the National Labor Relations Act of 1947, as amended, 29 U.S.C. Section 158(a)(5), Section 159(b)(7) and Section 159(d).

52. Said Labor Agreements require the signatory Casinos and Casino Hotels to deduct Union dues from employees represented by the Plaintiff Union and to forward said dues and certain employee benefit fund contributions to said Union for its respective Funds.

53. Both in its application and in its enforcement, Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) constitutes an impermissible impairment of the contractual obligations between the Plaintiff Union and said Casinos and Casino Hotels which have been negotiated pursuant to the requirements of the National Labor Relations Act. Said impairment is in violation of Article 1, Section 10 of the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs suit; and

(d) Other relief as deemed appropriate.

ELEVENTH COUNT

54. Allegations 1 through 15 are incorporated herein as fully as if set forth independently.

55. Section 93 of the New Jersey Casino Control Act (NJSA 5:12-93) is violative of the equal protection clause of the United States Constitution by distinguishing between labor organizations and employees in the hotel and restaurant service industries in the Casino and Casino Hotel Industry in Atlantic City, New Jersey and all other labor organizations and employees in the hotel and restaurant service industries within the State of New Jersey, vis-a-vis the application of rights created by the National Labor Relations Act of 1947, as amended, (29 U.S.C. Section 141 *et seq.*), and the Labor Management Reporting and Disclosure Act of 1959, as amended, (29 U.S.C. Section 401 *et seq.*).

WHEREFORE, Plaintiffs request this Honorable Court to grant judgment against the Defendants and in favor of the Plaintiffs and to award relief as follows:

(a) A Declaratory Judgment that Section 93 of the New Jersey Casino Control Act is void and invalid;

(b) To permanently enjoin the Defendants from enforcing or attempting to enforce the provisions of Section 93 of the New Jersey Casino Control Act;

(c) Reasonable attorney's fees and costs of suit; and

(d) Other relief as deemed appropriate.

MERANZE, KATZ, SPEAR and
WILDERMAN

BY MICHAEL N. KATZ
BERNARD N. KATZ
MICHAEL N. KATZ
Attorneys for Plaintiffs
200 North Texas Avenue
Atlantic City, New Jersey 08401
[609] 347-9363
12th Floor—Lewis Tower Building
N.E. Corner 15th & Locust Streets
Philadelphia, PA 19102
[215] KI-6-4183

DATED: 10/6/81

Commonwealth of Pennsylvania

: ss

County of Philadelphia

FRANK GERACE, being duly sworn according to law, does hereby certify that the facts set forth in the foregoing

Amended Complaint are true and correct to the best of my knowledge, information and belief.

FRANK GERACE

Sworn to and subscribed before me
this 6th day of October, 1981
Arlene R. Worley
Notary Public, Phila., Phila. Co.
My Commission Expires Jan. 31, 1984

APPENDIX D

Answer in Behalf of Defendants Danziger, *et al.*

[TITLE OMITTED IN PRINTING.]

By way of answer to the Amended Complaint Defendants Danziger, Thomas, McWhinney, Zeitz and Casino Control Commission say:

The Parties:

1. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations in Paragraph 1 of the Amended Complaint.

2. Defendants admit the allegation Paragraphs 2, 3, 4 and 5 of the Amended Complaint.

Jurisdiction:

3. Defendants deny that this action arises under the Constitution, Laws or Treaties of the United States or that there has been any threatened deprivation under color of state law of rights secured by the Constitution or Laws of the United States or that there has been any threatened deprivation of civil rights protected by any act of Congress. Defendants deny that the Declaratory Judgment Act confers jurisdiction on this Court.

Background:

4. Defendants have no knowledge or information sufficient to form a belief regarding the truth of the allegations in Paragraph 10 of the Amended Complaint.

5. Defendants admit the allegations of Paragraph 11, 12, 13, 14 and 15 of the Amended Complaint.

Counts I Through 11:

6. Defendants deny all the remaining allegations of the Amended Complaint.

Separate Defenses:

By way of separate defenses Defendants state:

1. The relief requested by Plaintiffs is barred because the principles of equity, comity and federalism demand that abstention is required.

2. Recovery is barred by reason of the failure of the complaint to set forth a cause of action upon which relief can be granted.

3. Defendants are immune from suit.

4. Defendants are immune from civil liablity for damages sought herein by Plaintiff's complaint.

5. Defendants are immune from suits brought under 42 *U.S.C.A.* §1983.

6. Plaintiffs have not been deprived of any right, privilege or immunity secured to them by the United States Constitution or any act of Congress.

7. Defendants acted at all times relevant in good faith and without any fraud or malice.

Appendix D

8. The Defendants did not know and were not reasonably expected to know that any actions taken by them with respect to this Plaintiff were in violation of Plaintiff's constitutional rights.

9. The complaint is frivolous, a sham and states no substantial federal question.

Reservation of Rights:

Defendants reserve the right, at or before trial, to move to dismiss the complaint, and/or for summary judgment on the grounds that the complaint fails to state a claim upon which relief can be granted and/or the Defendants are entitled to judgment as a matter of law, based upon any or all of the above defenses.

ROBERT J. GENATT
General Counsel
Attorney for Defendants

By JOHN ZIMMERMAN
Senior Assistant Counsel

APPENDIX E

Answer on Behalf of Defendants Brown, et al.

[TITLE OMITTED IN PRINTING.]

Defendants, G. Michael Brown, Department of Law and Public Safety and Brendan Byrne, in response to plaintiffs' amended complaint seeking declaratory and injunctive relief and monetary damages, say:

AS TO "THE PARTIES"

1., 2., 3., 4., 5.—Defendants admit the allegations of paragraphs 1, 2, 3, 4 and 5 of the amended complaint.

AS TO "JURISDICTION"

6. Defendants deny the allegation that this Court has jurisdiction of this complaint pursuant to either 28 U.S.C. §1331 or 28 U.S.C. §1337.

7. Defendants deny the allegation that this Court has jurisdiction of this matter pursuant to either 28 U.S.C. §2201 or 28 U.S.C. §2202.

8. Defendants deny the allegation that this Court has jurisdiction of this matter pursuant to 28 U.S.C. §1343(a)(3).

9. Defendants deny the allegation that this Court has jurisdiction of this matter pursuant to 28 U.S.C. §1343(a)(4).

AS TO "BACKGROUND"

10. Defendants admit the allegations of paragraph 10 of the amended complaint.

Appendix E

11., 12. Defendants admit the allegations of paragraphs 11 and 12 of the amended complaint.

13. Defendants deny the allegations of paragraph 13 of the amended complaint.

14. Defendants deny the allegations of paragraph 14 of the amended complaint.

15. Defendants admit the allegations of paragraph 15 of the amended complaint.

AS TO "FIRST COUNT"

16. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

17., 18. Defendants deny the allegations of paragraphs 17 and 18 of the amended complaint.

AS TO "SECOND COUNT"

19. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

20., 21., 22. Defendants deny the allegations of paragraphs 20, 21 and 22 of the amended complaint.

AS TO "THIRD COUNT"

23. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

24., 25. Defendants deny the allegations of paragraphs 24 and 25 of the amended complaint.

AS TO "FOURTH COUNT"

26. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

27., 28., 29., 30., 31. Defendants deny the allegations of paragraphs 27, 28, 29, 30 and 31 of the amended complaint.

AS TO "FIFTH COUNT"

32. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

33. Defendants deny the allegations of paragraph 33 of the amended complaint.

AS TO "SIXTH COUNT"

34. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

35. Defendants deny the allegations of paragraph 35 of the amended complaint.

AS TO "SEVENTH COUNT"

36. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

37. Defendants deny the allegations of paragraph 37 of the amended complaint. Defendants have alleged that certain officers of plaintiff union are disqualified in accordance with criteria delineated in Section 86(f) of the Casino Control Act.

38. Defendants deny the allegations of paragraph 38 of the amended complaint.

39. Defendants admit the allegations of paragraph 39 of the amended complaint.

40. Defendants deny the allegations of paragraph 40 of the amended complaint.

AS TO "EIGHTH COUNT"

41. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

42. In response to paragraph 42 of the amended complaint, defendants incorporate by reference herein the responses to paragraphs 37, 38 and 39 as previously delineated.

43. Defendants deny the allegations of paragraph 43 of the amended complaint.

AS TO "NINTH COUNT"

44. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

Appendix E

45. In response to paragraph 45 of the amended complaint, defendants incorporate by reference herein the responses to paragraphs 37, 38 and 39 as previously delineated.

46., 47., 48. Defendants deny the allegations of paragraphs 46, 47 and 48 of the amended complaint.

AS TO "TENTH COUNT"

49. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

50., 51. Defendants admit the allegations of paragraphs 50 and 51 of the amended complaint.

52. The allegations of paragraph 52 of the amended complaint state legal conclusions; the agreements referred to speak for themselves and the defendants need not affirm nor deny those allegations.

53. Defendants deny the allegations of paragraph 53 of the amended complaint.

AS TO "ELEVENTH COUNT"

54. Defendants herein incorporate by reference the responses to paragraphs 1 through 15 as previously delineated herein.

55. Defendants deny the allegations of paragraph 55 of amended complaint.

Appendix E

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Plaintiffs have not been deprived of any rights,

55. Defendants deny the allegations of paragraph 55 of amended complaint.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Plaintiffs have not been deprived of any rights, privileges or immunities secured to them by the United States or New Jersey Constitutions or the laws of the United States or the State of New Jersey.

THIRD SEPARATE DEFENSE

The defendants herein are public officials of the State of New Jersey, and at all times relevant were performing acts

within the scope of their official authority, in good faith and without fraud or malice, in the exercise of their duties.

FOURTH SEPARATE DEFENSE

Defendants are immune from suit.

FIFTH SEPARATE DEFENSE

The allegations of the plaintiffs do not present a cognizable claim under the Federal Civil Rights Act.

SIXTH SEPARATE DEFENSE

The plaintiffs have failed to exhuast their administrative and State court remedies.

SEVENTH SEPARATE DEFENSE

This Court lacks jurisdiction over the subject matter of this suit.

EIGHTH SEPARATE DEFENSE

The principles of federalism, comity, equity and abstention require that the complaint be dismissed.

NINTH SEPARATE DEFENSE

Any purported controversy raised by the instant complaint is not ripe for adjudication.

Appendix E

TENTH SEPARATE DEFENSE

The challenged provisions of the Casino Control Act have been adopted by the State of New Jersey pursuant to its police powers and is a proper and appropriate exercise thereof.

ELEVENTH SEPARATE DEFENSE

The defendants are not liable for payment of damages to plaintiffs by virtue of the Eleventh Amendment to the United States Constitution.

RESERVATION OF RIGHTS

Defendants reserve the right, at or before trial, to move to dismiss the complaint, and/or for summary judgment on the grounds that the complaint fails to state a claim upon which relief can be granted and/or the Defendants are entitled to judgment as a matter of law, based upon any or all of the above defenses.

Respectfully submitted,

JAMES R. ZAZZALI
Attorney General of New Jersey

By JAMES F. FLANAGAN, III
Deputy Attorney General

APPENDIX F

Order to Show Cause and Motion for Preliminary Injunction

(TITLE OMITTED IN PRINTING.]

ORDER TO SHOW CAUSE

Upon application and for good and sufficient cause, it is hereby Ordered and Decreed that Defendants appear before this Honorable Court on the day of 1981, at o'clock in Court Room of the United States District Court for the District of New Jersey, Post Office Building, Camden, New Jersey, and show cause why the Preliminary Relief requested by the Plaintiffs herein should not be granted.

It is further Ordered and Decreed until said time that the Defendants are hereby temporarily restrained from proceeding in any manner to enforce the provisions of Section 93 of the New Jersey Casino Control Act against Plaintiff, Hotel and Restaurant Employees and Bartenders International Union Local 54, and any of its officers or agents and from requiring said Plaintiff or its officers and agents to participate in such proceedings.

_____ J.

Dated: _____

Affidavit in Support of Application for Order to Show Cause

I, FRANK GERACE, being duly sworn, do hereby certify that I am President of Hotel and Restaurant Employees

and Bartenders International Union, Local 54 and am a Plaintiff in this matter. I hereby certify that the averments below are true and correct to the best of my knowledge.

1. Plaintiffs' Verified Complaint and Motion For Preliminary Injunction are incorporated herein as if fully set forth independently.

2. Defendant, Casino Control Commission, by Order dated August 5th, 1981, has ordered that hearings commence on September 9th, 1981 to enforce the provisions of Section 93 of the New Jersey Casino Control Act against Plaintiffs, Hotel and Restaurant and Bartenders International Union Local 54 and its officers and agents.

3. Said proceedings present an immediate and irreparable injury to the rights of the Plaintiff Union and its officers and agents which are guaranteed by Section 7 of the National Labor Relations Act and the United States Constitution.

4. Said proceedings present an immediate and irreparable impairment of the Plaintiff Union's ability to fully and properly function as the duly selected collective bargaining agent for over 8,000 Casino and Casino Hotel Industry employees, and further impairs the ability of said Plaintiff to properly administer its collective bargaining agreements.

5. Absent the issuance of the attached Order to Show Cause, the Plaintiffs will improperly be forced to immediately participate in proceedings which are violative of Section 7 of the National Labor Relations Act and of the United States Constitution and which are accordingly void and invalid.

Appendix F

6. Defendants will not be harmed or prejudiced by the issuance of the requested Temporary Restraining Order but the non-issuance thereof will be to the immediate detriment and injury of the Plaintiffs and of the Plaintiffs' rights as guaranteed by Section 7 of the National Labor Relations Act and the United States Constition.

FRANK GERACE

Sworn to and Subscribed:
Before Me This Day:
of , 1981:

CERTIFICATION OF NOTICE

I hereby certify that all Defendants were given notice of the within Application for an Order to Show Cause by telephone communications with each of said Defendants' respective offices on August 14th, 1981, at which time the Defendants were informed that Plaintiffs would make the attached Application to this Court on Monday, August 17th, 1981 at 9:30 A.M. at the United States District Court for the District of New Jersey, Post Office Building, Camden, New Jersey.

MICHAEL N. KATZ
Attorney for Plaintiffs

Order for Preliminary Injunction

Upon motion made and for good cause shown, it is hereby Ordered and Decreed that the Defendants in the

above action are hereby enjoined, pending a full hearing on the merits, from proceeding in any manner to enforce the provisions of Section 93 of the New Jersey Casino Control Act against the Hotel and Restaurant Employees and Bartenders International Union Local 54 and any of its officers or agents, and from requiring said Union and its officers and agents to participate in any further enforcement proceedings.

_____J.

Notice of Motion.

To: Martin Danzinger, Acting Chairman
Donald Thomas, Commissioner
Madeline McWhinney, Commissioner
Carl Zeitz, Commissioner

You are hereby given notice that Plaintiffs in the above matter, at a date and time to be set by the Court by way of the attached Order to Show Cause, will move this Honorable Court for a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. As grounds therefor, Plaintiffs aver the following:

1. The allegations contained in the Plaintiffs' Verified Complaint are incorporated herein.

2. On July 24th, 1981, a hearing was held before the New Jersey Casino Control Commission to determine certain legal issues raised by the Plaintiffs which are set forth in the Pre-trial Memorandum issued by said Defendant, and attached hereto as Exhibit "A."

3. On August 5th, 1981 Defendant, New Jersey Casino Control Commission ruled and ordered that proceedings to enforce Section 93 of the New Jersey Casino Control Act be commenced notwithstanding the issues raised by the Plaintiffs and, further, set September 9th, 1981 as the next hearing date. See Exhibit "C."

4. Said proceedings present an immediate and irreparable injury to the Plaintiffs' rights as guaranteed by Section 7 of the National Labor Relations Act and the United States Constitution.

5. Said proceedings present an immediate and irreparable impairment of the Plaintiff Union's ability to fully and properly function as the duly selected collective bargaining agent for over 8,000 Casino and Casino Hotel Industry employees, and to properly administer its collective bargaining agreements. Said proceedings also present an immediate and irreparable impairment of Plaintiff Gerace's ability to function as a duly selected officer of the Plaintiff Union.

6. Absent the issuance of a Preliminary Injunction, the Plaintiffs will be compelled to participate in proceedings which violate Section 7 of the National Labor Relations Act and the United States Constitution and which are void and invalid.

7. All of the above described injuries constitute irreparable harm for which there is no adequate remedy at law.

8. The granting of the Plaintiffs' Motion will result only in a Stay of further State proceedings pending the resolution of the various Federal questions which have been raised. This delay is far outweighed by the immediate harm suffered by the Plaintiffs as a result of said State proceedings.

9. It is likely that the Plaintiffs will prevail on the merits of this dispute.

10. The public interest will not be harmed by the issuance of the requested Preliminary Injunction and, in fact, such Preliminary Restraints will protect the public interest and policies contained in the National Labor Relations Act and the United States Constitution.

WHEREFORE, Plaintiffs request this Honorable Court to issue a Preliminary Injunction enjoining the Defendant from proceeding in any manner to enforce the provisions of Section 93 of the New Jersey Casino Control Act against the Plaintiff Union and its officers and agents.

MERANZE, KATZ, SPEAR AND WILDERMAN

By:_____

BERNARD N. KATZ
MICHAEL N. KATZ
Attorneys for Plaintiffs

(Jurat and certification of service omitted in printing.)

APPENDIX G

Motions for Dismissal and Judgment on the Pleadings

[TITLE OMITTED IN PRINTING]

Notice of Motion to Dismiss

PLEASE TAKE NOTICE that on January 15, 1982, at 10 a.m. or as soon thereafter as counsel can be heard, defendants Danziger, Thomas, McWhinney, Zeitz and Casino Control Commission, in accord with Rule 12 of the Federal Rules of Civil Procedure, will move to dismiss counts two, four and nine of the amended complaint on the ground that those counts fail to set forth a cause of action upon which relief can be granted because defendants are absolutely immune from suit for money damages under 42 *U.S.C.A.* §1983, and will further move to dismiss the entire amended complaint on the ground of abstention.

Counsel will rely on the brief filed herewith and, with respect to abstention, on the brief previously filed in opposition to the request for a preliminary injunction.

NEW JERSEY CASINO CONTROL
COMMISSION
Princeton Pike Office Park
Building No. 5
CN-208
Trenton, N.J. 08625

By JOHN ZIMMERMAN
Senior Assistant Counsel

Appendix G

Notice of Motion for Judgment on the Pleadings

Please take notice that the defendants, Department of Law and Public Safety, Division of Gaming Enforcement, Director G. Michael Brown, and Former Governor Brendan Byrne move the Court to dismiss the Amended Complaint on the grounds of abstention, or, in the alternative, to dismiss counts two, four and nine of the Amended Complaint on the grounds of immunity. The undersigned will bring the above motion on for hearing before the Court at the U.S. Courthouse and Post Office, Market Street, Camden New Jersey on the 19th day of March 1982 at 10 a.m. or as soon thereafter as counsel may be heard.

Respectfully submitted,

G. MICHAEL BROWN
Director
Division of Gaming Enforcement

By Stephen D. Schrier
Deputy Attorney General

APPENDIX H

Orders of the United States Supreme Court Noting Probable Jurisdiction

SUPREME COURT OF THE UNITED STATES

No. 83-498

G. MICHAEL BROWN, etc., *et al.*,

Appellants,

v.

HOTEL and RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*

APPEAL from the United States Court of Appeals for the Third Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with case No. 83-573, *Martin Danziger, etc., et al. v. Hotel and Restaurant Employees and Bartenders International Union Local 54, et al.*, and a total of one hour is allotted for oral argument.

November 28, 1983

Received
Dec 21 1983
New Jersey
Casino Control Commission

Appendix H

SUPREME COURT OF THE UNITED STATES

No. 83-573

MARTIN DANZIGER, etc., *et al.*,

Appellants,

v.

HOTEL and RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*

APPEAL from the United States Court of Appeals for the Third Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with case No. 83-498, *G. Michael Brown, etc., et al. v. Hotel and Restaurant Employees and Bartenders International Union Local 54, et al.*, and a total of one hour is allotted for argument.

November 28, 1983

Received
Dec 21 1983
New Jersey
Casino Control Commission

APPENDIX I

N.J. Stat. Ann. §5:12-78 (West Supp. 1983-1984).

N.J. Stat. Ann. §5:12-78 (West Supp. 1983-1984), entitled "Cooperation by licensees, registrants or applicants," provides:

Each licensee or registrant, or applicant for a license or registration under this act shall cooperate with the division in the performance of its duties.

APPENDIX J

N.J. Stat. Ann. §5:12-80 (West Supp. 1983-1984).

N.Y. Stat. Ann. §5:12-80 (West Supp. 1983-1984) "Licensing—General provisions," provides:

a. It shall be the affirmative responsibility of each applicant and licensee to establish by clear and convincing evidence his individual qualifications, and for a casino license the qualifications of each person who is required to be qualified under this act as well as the qualifications of the facility in which the casino is to be located.

b. Any applicant, licensee, registrant, or any other person who must be qualified pursuant to this act shall provide all information required by this act and satisfy all requests for information pertaining to qualification and in the form specified by the commission. All applicants, registrants, and licensees shall waive liability as to the State of New Jersey, and its instrumentalities and agents, for any damages resulting from any disclosure or publication in any manner, other than a willfully unlawful disclosure or publication of any material or information acquired during inquiries, investigations or hearings.

c. All applicants, licensees, registrants, intermediary companies, and holding companies shall consent to inspections, searches and seizures and the supplying of handwriting exemplars as authorized by this act and regulations promulgated hereunder.

d. All applicants, licensees, registrants, and any other person who shall be qualified pursuant to this act shall have the continuing duty to provide any assistance or information required by the commission or division, and to

cooperate in any inquiry or investigation conducted by the division and any inquiry, investigation, or hearing conducted by the commission. If, upon issuance of a formal request to answer or produce information, evidence or testimony, any applicant, licensee, registrant, or any other person who shall be qualified pursuant to this act refuses to comply, the application, license, registration or qualification of such person may be denied or revoked by the commission.

e. No applicant or licensee shall give or provide, offer to give or provide, directly or indirectly, any compensation or reward or any percentage or share of the money or property played or received through gaming activities, except as authorized by this act, in consideration for obtaining any license, authorization, permission or privilege to participate in any way in gaming operations.

f. Each applicant or person who must be qualified under this act shall be photographed and fingerprinted for identification and investigation purposes in accordance with procedures established by the commission.

g. All licensees, all registrants, all persons required to be qualified under this act, and all persons employed by a casino service industry licensed pursuant to this act, shall have a duty to inform the commission or division of any action which they believe would constitute a violation of this act. No person who so informs the commission or the division shall be discriminated against by an applicant, licensee or registrant because of the supplying of such information.

APPENDIX K

N.J. Stat. Ann. §5:12-107(c) (West Supp. 1983-1984).

N.J. Stat. Ann. §5:12-107(c) (West Supp. 1983-1984), entitled "Punishment of contempts," provides:

c. If any person in proceedings before the commission disobeys or resists any lawful order, refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct at the hearing or so near the place thereof as to obstruct the proceeding, the person may be punished for contempt in accordance with the Rules of Court if the commission certifies the facts underlying the contumacious behavior to the Superior Court. Thereafter, the courts shall have jurisdiction in the matter, and the same proceeding shall be had, the same penalties may be imposed, and the person charged may purge himself of the contempt in the same way as in the case of a person who has committed contempt in the trial of a civil action before the Superior Court.

APPENDIX L

N.J. Stat. Ann. §5:12-117 (West Supp. 1983-1984).

N.J. Stat. Ann. §5:12-117 (West Supp. 1983-1984), entitled "Employment without license, registration, or work permit; penalty," provides:

a. Any person who, without obtaining the requisite license or registration as provided in this act, works or is employed in a position whose duties would require licensing or registration under the provisions of this act is guilty of a misdemeanor and subject to not more than 3 years imprisonment or a fine of $10,000.00 or both, and in the case of a person other than a natural person, to a fine of not more than $50,000.00.

b. Any person who employs or continues to employ an individual not duly licensed or registered under the provisions of this act in a position whose duties require a license or registration under the provisions of this act is guilty of a misdemeanor and subject to not more than 3 years imprisonment or a fine of $10,000.00 or both, and in the case of a person other than a natural person, to a fine of not more than $50,000.00.

c. Any person who employs an individual without obtaining a work permit or does not return such permit as required by this act, is guilty of a misdemeanor and subject to a fine of not more than $10,000.00, and in the case of a person other than a natural person, to a fine of not more than $50,000.00.

d. Any person violating the provisions of subjection 101 e. of this act' shall be guilty of a misdemeanor, and

shall be subject to imprisonment for not more than 7 years or a fine of not more than $25,000.00, or both. Any licensee permitting or allowing such a violation shall also be punishable under this subsection, in addition to any other sanctions the commission may impose.

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No. 83-498

IN THE

Supreme Court of the United States

October Term, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO AFFIRM

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Dated: October, 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

MOTION

Appellees, Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President Hotel and Restaurant Employees and Bartenders International Union Local 54, hereby move this Honorable Court to affirm the decision of the Court below on the basis that the questions on which the decision of the cause depends are unsubstantial and do not warrant further argument.

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No. 83-498

IN THE

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G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO AFFIRM

STATEMENT OF THE CASE

This matter is before this Court on Appeal from the United States Court of Appeals for the Third Circuit. Appellants herein, the New Jersey Casino Control Commission and New Jersey Division of Gaming Enforcement seek the reversal of the Third Circuit's decision holding that Section 93 of the New Jersey Cacino Control Act, NJSA 5:12-93, is unconstitutional pursuant to the supremacy clause of the United States Constitution, Article VI, Clause 2. At the heart of the controversy at hand is the attempt by the Appellants to enforce Section 93 and Sec-

tion 86, as incorporated therein, of the New Jersey Casino Control Act, NJSA 5:12-93 and 86, against Appellee, Hotel and Restaurant Employees and Bartenders International Union Local 54.

Appellant, New Jersey Division of Gaming Enforcement is a branch of the New Jersey Department of Law and Public Safety created by the New Jersey Casino Control Act, NJSA 5:12-1 et seq. and is vested with the statutory duty and authority to conduct investigations under said Act and to seek enforcement of the terms thereof. Appellant, New Jersey Casino Control Commission, is an administrative agency also created under said State Act and is vested with the statutory duty and authority to administer and enforce the terms thereof.

Appellee, Local 54, is an unincorporated labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended (App. B, 88a).[1] It represents and engages in collective bargaining activities on behalf of approximately 12,000 employees. Approximately 8,000 said employees are employed in traditional hotel and restaurant service, *non-gaming* capacities in the Casino Hotel Industry in Atlantic City, New Jersey. The balance of its membership is employed, for the most part, in non-casino hotel and restaurant service related industries. (Plaintiffs' Exhibit 9).

By virtue of Local 54's collective bargaining efforts, its entire membership, both those employed in casino hotels and those employed in non-casino hotel operations,

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[1]References to an Appendix refer to Appellee's Joint Appendix to Jurisdictional Statements. References to other documents refer to documents contained in Appellees' Exhibits in support of motion.

participates in the Hotel and Restaurant Employees and Bartenders International Union Welfare and Pension Funds and the Hotel and Restaurant Employees and Bartenders International Union Local 54 Severance Fund. These are jointly administered employee benefit funds established pursuant to Section 302 of the Taft Hartley Act and 29 U. S. C. Section 186, and regulated and administered pursuant to the terms of the Employee Retirement Income Security Act, 29 U. S. C. 1001 et seq. Appellee, Frank Gerace, President of Local 54, is a Trustee to the International Welfare and Pension Funds (App. B, 88a). Mr. Gerace, and other officers of the Union are Union Trustees to the Severance Fund. (Plaintiffs' Exhibits 5 & 8).

At the inception of the Casino Industry in Atlantic City, Local 54 had been functioning for many years as the duly authorized collective bargaining agent for employees of those hotels which were converting to casino operations. At the inception of casino gambling, however, Local 54 was faced with a new piece of State Legislation, Section 93 of the Casino Control Act, NJSA 5:12-93, which required that Local 54 and its officers and agents register with the Casino Control Commission and subject itself to the Commission's regulation as a condition of continued representation of these very same employees. Despite a clear and overriding policy of advice that certain provisions of the New Jersey Casino Control Act, including Section 93, as they apply to labor organizations, violated preempted and federally guaranteed rights, Local 54 filed its initial registration statement and complied with all documentary steps which the New Jersey Act directed be followed by the Union and certain of its officers. These fil-

ings were made as required, some as early as 1978, and were in the files of the Appellants for an extensive period of time without any questions or any objections being raised. It should be underscored that by filing the documents neither Local 54 nor any of the individuals who filed the directed forms waived or in any way indicated an intent to waive the position that there was neither jurisdiction of the New Jersey Casino Control Act nor applicability of its provisions to labor organizations. However, Local 54, being confronted with the serious and demanding responsibility of collective bargaining representation of thousands of employees, had no desire to drain its energies in litigating obligations with which it had no difficulty in complying. Accordingly, Local 54 filed its initial registration statement and maintained its status without challenge until May, 1981.

On May 11, 1981, the New Jersey Division of Gaming Enforcement filed with the Casino Control Commission a complaint by letter alleging certain violations of Section 86 of the Casino Control Act by Local 54 and some of its officers and further requested, pursuant to Section 93(b), that the Commission revoke Local 54's registration and prevent the Local from collecting Union dues from or administering Health and Welfare and Pension Funds on behalf of Casino and Casino Hotel Industry employees which it represents (App. D, 132a).

On June 1, 1981, the New Jersey Casino Control Commission held a pre-hearing conference as a result of the complaint filed by the Division of Gaming Enforcement. From the conference, several issues emerged which were to be briefed and argued at further proceedings in front of the Commission including the issue of whether Section

93 of the State Act was preempted by the National Labor Relations Act, as amended, 29 U. S. C. Section 141 et seq. and by ERISA, 29 U. S. C. Section 1001 et seq. Ultimately, on August 5, 1981, the Commission determined to continue with its proceedings notwithstanding the preemption issues which had been raised.

As a result, on August 17, 1981, Appellees filed suit in the United States District Court for the District of New Jersey claiming, among other issues, that Section 93 of the New Jersey Casino Control Act was preempted by the Labor Management Relations Act and Employee Retirement Income Security Act. Appellees also filed at that time an Order to Show Cause requesting a temporary restraining order and a Motion for Preliminary Injunctive Relief seeking to have Appellants, Casino Control Commission and Division of Gaming Enforcement enjoined from taking any steps in furtherance of the enforcement of Section 93 of the State Act pending a final determination by the District Court of the issues raised in the pending suit. At a hearing held on that date, the Court below requested and ultimately received from the Appellants an agreement to hold all State proceedings in abeyance pending the Court's determination of the pending Motion. On December 1, 1981, a hearing was held on Appellee's Motion for Preliminary Injunctive Relief. Uncontroverted evidence by way of affidavit, was entered of record by agreement of the parties (Plaintiffs' Exhibits 5 through 9). On March 22, 1982, the District Court denied the Motion and thereafter, Appellees herein filed a timely appeal to the United States Court of Appeals for the Third Circuit.

During the pendency of the Appeal before the Third Circuit, the proceedings before the New Jersey Casino Control Commission continued without abatement. On

September 28, 1982, the Commission rendered its decision disqualifying Local 54 and ordering that it be barred from collecting dues from employees employed in casino hotels. (App. D, 131a). The Commission based its decision on its finding that two officials of the Union had violated Section 86(f) of the State Act, NJSA 5:12-86(f), by associating with individuals involved in organized crime and that one official was in violation of Section 86(c), NJSA 5:12-86(c) as a result of a prior criminal conviction.[2] The Commission further ruled that Local 54 could avoid the sanctions imposed if the officials involved were removed from office (App. D, 197a). A supplemental decision was issued by the Commission on October 12, 1982 holding in abeyance the additional sanctions of barring the administration of employee benefit funds. The Commission made clear, however, that it viewed itself fully empowered to levy such a sanction if deemed necessary (App. F, 208a).

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[2]Contrary to the Appellant's assertions, it should be noted that at no time did the Commission find that in fact Local 54, its officers or agents were influenced by any member of organized crime with respect to the conduct of the Union's affairs. To the contrary, the Commission admitted that it had no evidence that any officer or agent of the Union had breached any fiduciary obligations, committed any unlawful conduct, or had made any Union related business decisions due to the influence of organized crime. The Commission's decision further made clear that it in fact had been presented with no evidence that organized crime was even attempting to gain access to the Casino Industry via an association with Local 54 or its officials (App. D, 176a).

It should also be noted that the disqualification based on the prior criminal conviction involving the conduct of an official many years prior to his involvement with Local 54 was totally unrelated to labor matters. At the time of the Commission's ruling, the individual involved had long since fulfilled the penalties that had resulted from his conviction and was fully eligible to hold Union office under federal law. (App. D, 203a-204a).

As a result of the Commission's decision, Appellees obtained temporary injunctive relief from the District Court pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. On June 6, 1983, the Third Circuit issued its decision finding Section 93 of the State Act to be preempted by the Labor Management Relations Act, 29 U. S. C. Section 141 et seq. and Employee Retirement Income Security Act, 29 U. S. C. 1001 et seq. and reversed the District Court's refusal to grant preliminary injunctive relief.[3] Thereafter, Appellant's Motion for Rehearing was denied and the instant appeal was filed.

ARGUMENT

THE QUESTIONS PRESENTED ON APPEAL ARE NOT SUBSTANTIAL

1. It is Well Established that the States Cannot Attempt to Regulate the Status of a Labor Organization as the Collective Bargaining Agent for Employees Employed in an Industry in Interstate Commerce.

Appellants have in essence based their appeal on the contention that the Third Circuit improperly determined that the Labor Management Relations Act, 29 U. S. C. 141 et seq. and more particularly the rights set forth in Section 7 thereof, 29 U. S. C. Section 157, preempt the State of New Jersey from exercising its police powers in what the Appellants characterize as an area of particular and

[3] In the aftermath of Commission's decision, Appellees herein also filed an appeal with the Superior Court of New Jersey, Appellate Division. This was done solely to preserve the instant Appellee's right of appeal in that forum, under the State Rules, in the event that the Third Circuit rendered a decision making it appropriate to continue with further State proceedings. At no time was this a waiver of the Appellee's rights to have the federal issues involved resolved by the federal courts. Upon issuance of the Third Circuit's decision the State Appeal was dismissed without prejudice.

deeply rooted local concern. This, however, does not accurately reflect the nature of the industry in question and the specific regulatory scheme in issue as it applies to the Appellees.

The Casino Hotel Industry in Atlantic City, from its very inception, has been anything but a local State industry. It is a multi-faceted industry involving billions of dollars of interstate commerce annually. Patrons in vast numbers are sought and drawn by slick promotional campaigns from all over the country. Workers have travelled from equally diverse corners to fill the tens of thousands of jobs which have been made available as a result of the industry's development. Goods and services essential to the daily operation of the casinos and casino hotels are procured routinely in staggering quantities from numerous other industries involving interstate commerce. In this regard, judicial notice should be taken that the National Labor Relations Board has exercised its jurisdiction in this industry on numerous occasions. (See Trans. of Hearing of December 1, 1981, at Page 38).

Furthermore, the regulation which the Appellants seek to impose on the Appellees does not even in fact involve the regulation of gaming activities themselves. Appellee, Local 54 serves as a collective bargaining agent for hotel and restaurant service employees employed in casino hotels, *not* gaming employees. The employees represented by the Union are not the cooks, bartenders, waitresses, bellmen, chambermaids, and other employees involved in typical hotel and restaurant services. They are not the dealers, casino cashiers, security guards, or other employees actually involved in gaming activities. (Plaintiffs' Exhibit 9) The employees represented by Local 54 are no different than any other hotel and res-

taurant service employee throughout the country. The ability of the state to regulate the representational status of a labor organization representing the types of employees represented by the Appellees does not involve the regulation of gaming itself and can hardly be viewed as a matter of particular local concern or sensitivity.

In addition, the state statutory scheme which Appellants seek to vindicate goes far beyond the regulation of gaming and prevention of corruption which Appellants have characterized as the exercise of the State police power in an area of deeply rooted local concern. It is a scheme which impacts directly on a federal statutory scheme and policy designed to foster and implement a uniform system of labor relations throughout all industries involving significant interstate commerce. Contrary to the Appellant's assertions, Section 93 of the Casino Control Act, NJSA 5:12-93, when taken in the context of the entire State statutory framework of which it is a part, does not merely protect the Casino Industry from corrupt individuals who serve as union officials. Section 93 is designed to enable the State to directly regulate the representational status and ability of a labor union, as an institution, in its capacity as collective bargaining agent for employees in a major industry in interstate commerce. Section 93 impermissibly conflicts with the rights of those employees to select the institution itself as their bargaining representative. On this basis alone, without considering the question of the selection of individual officers, Section 93 is violative of rights protected by Section 7 of the Labor Management Relations Act. A close review of the State regulatory scheme makes this clear.

Section 93 of the Casino Control Act requires labor organizations and their officers, agents and principal em-

ployees, who are otherwise duly authorized pursuant to Federal law to represent employees in a major industry in interstate commerce, to register with the Commission as a *condition precedent* to functioning in such a representational capacity. A union and those of its employees covered by the State Act have no choice in this regard. The failure to register and provide the requisite information set forth in Section 93(a) constitutes a disqualification under Section 86(b) and triggers the sanctions contained in Section 93(b). Furthermore, if a union, its officers, agents or principal employees attempt to function in a representational capacity without registering pursuant to Section 93(a), they are also subject to the criminal sanctions and penalties provided by Section 117 of the State Act, NJSA 5:12-117.

The failure to register or provide any other information required by either the Commission or the Division also constitutes violations of Section 78 and Sections 80(b), (c), and (d) of the State Act, NJSA 5:12-78, 80(b), (c), and (d). In order to enforce the disclosure of information required by Section 93(a) or these other Sections the Commission can also issue an order requiring such disclosure with contempt powers to enforce compliance therewith as set forth in Section 107(c), NJSA 5:12-107(c).

Once a union and its officers, agents, and principal employees register, a system of review and investigation is triggered wherein the union and its registered employees are under a continuing obligation, pursuant to Section 78 and 80 of the State Act to provide the Appellants with any and all information deemed relevant. The failure to provide such information again triggers a disqualification under Section 86(b) and the sanctions con-

tained in Section 93(b). Again, the Commission can invoke contempt powers under Section 107(c) to enforce compliance with its order to produce the demanded information. Upon a determination that any of the officers, principal employees or agents or a labor organization are disqualified under Section 86 of the State Act, the sanctions set forth in Section 93(b) again are implemented.

The scope of the information a Union and its employees are required to disclose to the Appellants under the State Act is exceptionally broad based and tantamount to being required to disclose every conceivable business record maintained by a Union which the Appellants in their unlimited discretion, deem is relevant.

The scope of disqualifying criteria set forth in Section 86 of the State Act, pursuant to which the sanctions set forth in Section 93(b) are imposed, is equally broad. Union officials can be disqualified for any one of dozens of criminal offenses, from misdemeanors to felonies, for failing to *cooperate* with the Appellants, for being a Defendant in a *pending* criminal matter, for engaging in conduct violative of "public policy" for economic gain, or for *associating* with career offenders. Many of these disqualifying criteria have nothing at all to do with the prevention of corruption and the infiltration by organized crime in the Casino Industry.

The enforcement powers which have been granted to the Appellants are extraordinary and invite a total disruption of legitimate union activity. If a union refuses to provide *any* information demanded by the Appellants, the union and its officers are subject to contempt sanctions as well as disqualification and the sanc-

tions set forth in Section 93(b). If the union and its officials fail to register but attempt to function as collective bargaining agents, notwithstanding that they may be duly certified by the National Labor Relations Board, they are subject to criminal sanctions and, again, contempt proceedings. Finally, if officials of a Union are found to be disqualified for any of the reasons set forth in Section 86, again the sanctions set forth in Section 93(b) are invoked. These sanctions, particularly the bar to the collection of dues, are designed to control the functional ability of a labor organization and in practical terms prevent its functioning except upon conditions set by the State.

It is within this total statutory context that the constitutional infirmity of Section 93 of the Casino Control Act must be measured. It must be noted that the Appellees are not contending that the State cannot exercise its police powers to regulate the Casino Industry and prevent the incursion of organized crime through illegitimate labor activity. However, the *specific method* which the State has chosen to achieve this goal goes to the heart of the uniform system of labor relations mandated by the Labor Management Relations Act. While Section 93 of the Casino Control Act may be viewed as one part of a comprehensive scheme to regulate gambling, it pursues this purpose by directly and unequivocally regulating the representational status and functioning of labor organizations that have been duly selected under the federal regulatory scheme to serve as the collective bargaining agent for workers employed in a major industry involving an enormous amount of interstate commerce. It pursues this purpose by empowering the State, via the Casino Control Commission, to effectively terminate rep-

resentational activity, in a broadly defined "Casino Industry," of labor organizations which do not meet State imposed criteria. It is here that the State's scheme most obstrusively runs afoul of the Section 7 rights and regulatory scheme established under the Labor Management Relations Act.

This Court has consistently held that where rights guaranteed under Section 7 of the Labor Management Relations Act, 29 U. S. C. 157, are impeded or frustrated by State laws, that the State laws are invalid and must yield to the federal enactment. This was made abundantly clear in *Electric Railway Employees v. Wisconsin Employment Relations Board,* 71 S. Ct. 359 (1951), where this Court held that the National Labor Relations Act of 1947, in which Section 7 was first articulated, preempts the field covered by this Act and further that the National Labor Relations Act and its successor, the Labor Management Relations Act are the supreme law of the land under Article VI of the Constitution. This Court held therein that any State law which conflicts with the rights created under the federal act cannot stand.

These principals have been reiterated by this Court over the ensuing years in *San Diego Building Trades Council v. Garmon,* 79 S. Ct. 773 (1959) and in *Nash v. Florida Industrial Commission,* 88 S. Ct. 362 (1967). In *San Diego Building Trades Council v. Garmon, supra,* this Court stated:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that State jurisdiction must yield. To leave the States

> free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. (79 S. Ct. 773 at 779).

In the instant case, the State of New Jersey has attempted to do just that which this Court has declared as proscribed. The State has attempted to regulate conduct "plainly within the central aim of federal regulation." While the State contends its purpose is to prevent corruption of the Casino Industry, it has sought to achieve this purpose by legislation which goes to the very heart of the application of rights under Section 7 of the Labor Management Relations Act. Via Section 93 of the Casino Control Act and the other various sections of the Act which apply to labor organizations as a result thereof, the State has given itself the power to in essence "certify" or "decertify"a labor organization as the collective bargaining agent for employees employed in a major industry in interstate commerce. If the State deems a labor organization to be "unsuitable" as a result of a violation of any of the State Act's requirements, the State has empowered itself to effectively terminate the labor organizations functioning in a representational capacity. The State can so act notwithstanding that the labor organization has been duly authorized to act as a bargaining agent pursuant to the terms and policies of the Labor Management Relations Act and procedures of the National Labor Relations Board. This is the clear import and effect of the registration requirements of Section 93 and the criminal and civil sanctions the State can levy under Sections 93(b), 107(c) and 117 of the State Act.

This Court had occasion to review a state legislative scheme similar in many respects to that in issue here and

vigorously condemned it. The case of *Hill v. Florida*, 65 S. Ct. 1373 (1945) involved a statute of the State of Florida which regulated unions by requiring that all unions operating therein file a registration statement and pay a registration fee. The statute further provided that all those who sought to function as a business agent for a union had to apply to the State for a license and establish, among other things, a history free from any criminal convictions and, in addition, good moral character.

This Court found the State Act to impermissibly interfere with the rights of employees under the National Labor Relations Act to select a collective bargaining representative of their own choosing and further found that the State Act interfered with collective bargaining and thereby impermissibly frustrated the collective bargaining policies promoted and mandated by Congress.

In reviewing Section 4 of the Florida statute, the portion which set forth the licensing criteria for business agents employed by a union, this Court stated:

> It is apparent that the Florida statute has been so construed and applied that the union and its elected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown, in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end, Congress has made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications. 65 S. Ct. at 1374.

This Court in *Hill* also reviewed Section 6 of the Florida statute which required the actual registration as a condition to acting in representational capacity. This Court stated:

> Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not be without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. *Western Union Telegraph Co. v. Commonwealth of Massachusetts,* 125 U. S. 530, 553, 554, 8 S. Ct. 961, 965, 966, 31 L. Ed. 790; *Kansas City Southern R. Co. v. Kaw Valley Drainage District,* 233 U. S. 75, 78, 34 S. Ct. 564, 565, 58 L. Ed. 857; *St. Louis Southwestern Ry. v. State of Arkansas,* 235 U. S. 350, 368, 35 S. Ct. 99, 104, 59 L. Ed. 265. This is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of Court and to conviction under the misdemeanor section of the Act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act. (65 S. Ct. at 1375).

In the instant case, Section 93 of the Casino Control Act is similarly defective. Here, the State of New Jersey has also promulgated criteria which must be met in order for a labor organization to function in a representational capacity. Not only must a union and its officials register with the State as a condition precedent to the union acting as a collective bargaining agent but the union and its officials must meet all of the requirements of Sections 78,

80(b), (c), and (d), and 86 of the State Act in order for the Union to continue to act in its representational capacity. If a union and its officials refuse to register, criminal sanctions and civil contempt penalties can be imposed under Sections 117 and 107 and if a union or its officials refuse to provide any information demanded by the State, or otherwise fail to meet the standards set forth in Section 86, the sanctions contained in Section 93(b) are imposed against the union. The sanctions which the State is empowered to impose, particularly those of a criminal nature under Section 117 and those set forth under Section 93(b) have the practical effect of terminating the representational activities of the union as an institution thereby denying employees the collective bargaining agent of their choosing.

The Appellants contend that *Hill v. Florida, supra,* is inapplicable to the instant case on the basis that the former involved regulation of all unions while the latter involves only labor organizations functioning in a particular industry. This distinction is specious, however, for it invites a piecemeal erosion of the congressional labor relation policies set forth in the Labor Management Relations Act. Once it is established that a major industry in interstate commerce can be singled out as a sensitive industry of particular local concern to a particular state and thereby removed from the central core of the federal regulatory scheme for labor relations, the door will be opened to invite other states to similarly identify other industries and enact similar state legislation.

Further, such a distinction embodies an artificial concept of union representation of employees employed in the casino industry. With the exception of employees actually engaged in gaming activities, the employees employed in

the casino hotels are the same types found throughout the State of New Jersey in positions totally unrelated to the casino hotel industry. They are bartenders, cooks, waitresses, chambermaids, parking lot attendants, janitorial workers, and other types of employees normally associated with service industries. A union which represents these types of employees in the casino industry may very well represent the same types of employees outside of the casino industry. Such a union is not a bifurcated institution; it is a single entity simply representing certain kinds of employees in a particular geographic area. These employees, both casino hotel and non-casino hotel, are represented by the same union with the same officials and agents. An attempt by the State to segregate these representational activities into "casino related" and "non-casino related" is simply a fiction and the regulation of the former amounts to the regulation of the latter. Local 54 is a case in point. In addition to the casino hotel employees it represents, Local 54 represents several thousand employees outside of the Casino Industry (Plaintiffs' Exhibit 9). Any attempt by the State of New Jersey to sanction Local 54 under the terms of the Casino Control Act impacts inexorably on those aspects of Local 54's representational activities outside the purview of the State Act (Plaintiffs' Exhibits 5 through 9). The total pool of union dues remitted to the Union by all of its members fund all of the representational activities on their behalf. If the union removed disqualified officials to avoid sanctions imposed by the Casino Control Commission, it would be removing officials placed into office not just by casino hotel employees but also by the several thousand non-casino employees who also make up Local 54's membership. Accordingly, it is misleading and inaccurate for the Appel-

lants to contend that the enforcement of Section 93 of the Casino Control Act is limited in impact to the Casino Industry. The State Act impacts adversely in a material manner on all representational activities of a union, both within and outside of the Casino Industry, and hence, impacts adversely on the overall labor relations policies which Congress established for all industries in interstate commerce.

The Appellants further contend that the Third Circuit erred by applying a strict preemption doctrine to the State's attempt to regulate the representational status of the Appellee union. The Appellants assert that instead a balancing of the federal and State interests involved should have been undertaken to reach an accommodation of federal policies and matters of deeply rooted local concern. The Appellants contend that this Court has abandoned the precepts of *San Diego Building Trades Council, supra* in favor of such an approach in all situations where preemption by the Labor Management Relations Act is at issue.

While this Court has applied a more flexible approach to preemption in appropriate situations, this Court has never articulated that the underlying concepts of *Hill v. Florida, supra* and *San Diego Building Trades Council, supra* should be given less than full credence and effect in a situation where what is at issue is the very crux of the federal labor relations scheme. It must be reiterated that what is at issue here is whether a State can regulate the representational status of a labor organization representing employees in a major industry in interstate commerce. The State of New Jersey, by virtue of Section 93 of the Casino Control Act, has given itself the power to require union registration as a prerequisite to representa-

tional activity and further to curtail or terminate such activity by the institution itself if it or some of its officials fail to comply with various terms and conditions of the State Act. This is tantamount to a direct attack on the very core of the federal scheme to promote a cohesive policy of collective bargaining. It is of no merit in this regard, for the Appellants to claim that the real purpose of the State Act is to coerce the removal from office of disqualified individuals. This is nothing more than imposing by administrative determination another set of State criteria which must be met for the union as an institution to continue to function. Ultimately, all of the sanctions contemplated by the State Act, particularly those set forth in Section 93(b), are designed to coerce compliance with State imposed criteria by interfering with, barring, or terminating the representational activities of the union itself.

The only situation even remotely similar to the instant case where this Court has permitted state action of this type is that which was found in *Deveau v. Braisted*, 80 S. Ct. 1146 (1960). *Deveau*, involved a bi-state compact fully canvassed and approved by congress and this critically distinguishes *Deveau* from the instant case. In light of Congress' relationship to the compact, this Court concluded that the State legislation in issue did not conflict with rights protected by Section 7 of the Labor Management Relations Act, stating:

> In giving this authorization Congress was fully mindful of the specific provisions of § 8. Not only had § 8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International

> Longshoremen's Association, as a ground of opposition to congressional consent, that approval of the compact by Congress would carry with it sanction of § 8. See Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 83rd Cong., 1st Sess. on H. R. 6321, H. R. 6343, and S. 2383, p. 136. The ground of objection to the section which is appellant's primary reliance here, namely, that it conflicts with existing federal labor policy, was urged as ground for rejecting the compact. *It is in light of this legislative history that the compact was approved, and that congressional consent was given to "enactments in furtherance thereof."* (80 S. Ct. 1146 (1960) at Page 1150)
> (Emphasis added).

> This is not all. As we have seen, § 8 was brought to the attention of Congress as part of the legislation which would come into effect as an adjunct to the compact, and the objection was raised at that time and not heeded that § 8 unduly interfered with federal labor policy. *Finally, it is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation not formally part of the compact. This provision in the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts.* (80 S. Ct. 1146 (1960) at page 1152).
> (Emphasis added.)

It was in these unique circumstances, which are absent here, that this Court ruled that the State Act did not violate federal labor policy. In so ruling, however, this Court was careful to preserve the fundamental supremacy of federal labor policy as articulated by *Hill v. Florida*, supra, stating:

> The decision in *Hill v. State of Florida*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782, in no wise obstructs this conclusion. *An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was*

> *not present in that case.* Nor was it true that *Hill v. State of Florida,* as it is here, that the challenged state legislation was *part of a program, fully canvassed by Congress through its own investigations,* to indicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry.
> (80 S. Ct. 1146 (1960) at page 1154, emphasis added.)

Absent such unique circumstances, where a State purports to regulate whether a labor organization can function as a collective bargaining agent for thousands of employees employed in a major industry in interstate commerce, such action must be deemed an impermissible intrusion into rights guaranteed by Section 7 of the Labor Management Relations Act.

Even assuming arguendo that the preemption doctrine requires that a balancing test be applied, it is clear that the resolution thereof requires the affirmation of the judgment of the Third Circuit. This Court's most current articulations of the preemption doctrine are found in *Belknap v. Hale,* 103 S. Ct. 3172 (1983) and *Local 926 International Union of Operating Engineers v. Jones,* 103 S. Ct. 1453 (1983), neither of which involve an attempt by a state to regulate the representational status of a labor organization.

In *Belknap, supra,* this Court reaffirmed that pursuant to *San Diego Building Trades Council v. Garmon, supra,* state regulations are presumptively preempted if they concern conduct that is actually or arguably prohibited or protected by the Labor Management Relations Act. The state regulation, however, can be upheld if the behavior to be regulated is of deeply rooted local concern. In such cases, the State's interests are balanced against both the interference with the NLRB's ability to adjudicate con-

troversies within its jurisdiction and the risk that the state will sanction conduct which is protected by the Labor Management Relations Act. This Court further states, however, that:

> Under *Garmon*, a State may regulate conduct that is only of peripheral concern to the Act or which is *so* deeply rooted in local law that the Courts should not assume that Congress intended to preempt the application of State law. (103 S. Ct. 3172 at 3182, emphasis added.)

In *Local 926, supra*, this Court further stated:

> The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress either *in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules* and the importance of the asserted cause of action to the state as a protection to its citizens. (103 S. Ct. 1453 at 1459, emphasis added.)

> Beyond that, the preemption doctrine not only mandates the substantive preemption by the federal labor law in areas to which it applies but *also protects the exclusive jurisdiction of the National Labor Relations Board over matters arguably within the reach of the Act.* (103 S. Ct. 1453 at 1461, emphasis added).

In the instant case, the State of New Jersey has empowered itself to determine whether a labor organization otherwise certified as a collective bargaining agent under policies and procedures established by the Labor Management Relations Act and National Labor Relations Board shall be permitted to continue to function in such a capacity. This is a clear intrusion into an area within the Board's exclusive jurisdiction and which cannot be deemed

a matter of deeply rooted local concern. What is at issue is the ability of a union duly authorized to act as collective bargaining agent pursuant to the policies and procedures of the NLRB and Labor Management Relations Act to continue to act in such a capacity.

In addition, the state policies and concerns underlying State action in this area are designed to curtail rather than enhance the free choice by employees of a collective bargaining agent thereby conflicting with the policies set forth under the federal act. This intrusion goes to the very core of the entire federal labor relations scheme. The result is that an otherwise duly selected and certified labor organization can find itself prevented from acting in a representational capacity in furtherance of state interests which are totally unrelated to the concerns and policies of the Act. This can serve only to thoroughly disrupt and dismantle the process of collective bargaining and contract administration which are the fundamental underpinings for the entire federal labor regulatory scheme. Such an intrusion cannot be minimized. The net result is labor relations chaos in a major industry in interstate commerce.

In contrast, absent Section 93 of the Casino Control Act, the State of New Jersey still has ample means to serve the State interests of preventing corruption of the casino industry via illegitimate labor related activities. The State has at its disposal its criminal laws of general application, proscriptions found in the Labor Management Reporting and Disclosure Act, 29 U. S. C. § 401 et seq, the Rackateer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1961 et seq., and the Hobbs Act, 18 U. S. C. § 1951 et seq., to meet these needs. In addition, the State

can certainly exercise its police powers to promulgate additional legislation which serves its purposes but which does not intrude into a highly sensitive area of federal concern involving the selection of collective bargaining agents.

Accordingly, assuming arguendo, that a balancing test is even appropriate when the intrusion by the State is such that is found here, the balance should be resolved in favor of the supremacy of the federal Act and Section 7 rights thereunder.

2. It is Well Established that the States Cannot Regulate the Administration of Employee Benefit Funds Which are Regulated Under ERISA.

Section 514(a) and (c) (1) of ERISA, 29 U. S. C. 1144 (a) and (c) (1), respectively state in their relevant parts ". . . the provisions of this title . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." (29 U. S. C. 1144 (a) and "the term State law includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any state." (29 U. S. C. 1144(c) (1)).

The express language of Section 93(b) of the Casino Control Act demands that ERISA preemption be applied. Section 93(b) clearly states that it purports to regulate the administration of health and welfare and pension funds. This clear and unequivocal indication of State legislative intent suffices to bring it into the purview of Section 514 of ERISA.

This Court, in *Alessi v. Raybestos-Manhattan, Inc.*, 68 L. Ed. 2d 402 (1981) made salient the scope of preemption intended by Section 514, stating:

> This provision demonstrates that Congress intended to depart from its previous legislation that "envisioned the exercise of state regulations over pension funds," *Maloney v. White Motor Corp.*, 435 U. S. 497, 512, 514, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978) (plurality opinion), and meant to establish pension plan regulation as exclusively a federal concern. (68 L. Ed. 2d 402 at p. 416)

Accordingly, Section 93 of the Casino Control Act is preempted to the extent it purports to regulate the administration of employee benefit plans.

It is of no import that Section 93 is part of a statutory scheme ostensively designed to regulate casino gambling. This Court, in *Alessi, supra,* further stated:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the preemption provision, ERISA defines the term State to include "a State, or any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." 29 U. S. C. Section 1144(c) (2) [29 UCSC Section 1144 (c) (2)] (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provisions. (68 L. Ed. 2d at 402 at Page 418).

Similarly, the real issue at hand and the practical impact of Section 93(b) cannot be masked by labelling it a State regulation of gambling. Further, the Appellants cannot justify this aspect of Section 93 by contending that it is really designed to merely force the removal from

office individuals who are deemed to be disqualified. To the extent that a Union is involved in the administration of jointly administered employee benefit funds, either by the selection of union trustees to the funds or in any other manner, this is an area preempted in its entirety by ERISA.

CONCLUSION

For the reasons stated above, it is submitted that the Appellants have not presented questions which are substantial in nature and that the decision of the Third Circuit should be affirmed.

Respectfully submitted,

MERANZE, KATZ, SPEAR & WILDERMAN

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*Counsel of Record

Dated, October, 1983

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No. 83-498

IN THE

Supreme Court of the United States

October Term, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

EXHIBITS IN SUPPORT OF MOTION TO AFFIRM

APPENDIX

P-5 AFFIDAVIT OF MICHAEL GANTERT

AFFIDAVIT

State of New Jersey |
| ss
County of Atlantic |

My name is Michael Gantert and I reside at 29 South Webster Street, Naperville, Illinois. I am the Executive Vice President and Chief Operational Officer of William L. Meyers, Incorporated and have served in this capacity for the last two years. I have been an officer of this corporation since 1975 and further have been personally involved with providing consultation services to and participating in the administration of employee benefit plans since 1974.

William L. Meyers is a corporation in the business of supplying employee benefit plan consultants and also participates in the administration of such plans. Among those plans with which we are involved are the Hotel Employees and Restaurant Employees and Bartenders International Union Pension Fund as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Health & Welfare Fund. LOCAL 54 is a Collective Bargaining agent representing employees who are participants in these funds and is involved in the Hotel Employees and Restaurant Employees and Bartenders International Union Pension Fund as well as the Hotel Employees and Restaurant Employees and Bartenders International Union Local 54 Health & Welfare Plan which is

one of several plans within the International Health and Welfare Fund.

LOCAL 54 and its officers participate in the operation of these funds on a daily basis by virtue of their negotiation of various collective bargaining agreements with various contributing employers and accordingly LOCAL 54 is a sponsor of these benefit plans. There are approximately 10,000 members of LOCAL 54 who participate in these plans, approximately 8,000 of which are casino hotel employees and approximately 2,000 of which are non-casino hotel employees.

LOCAL 54 is directly involved in these benefit plans in that the benefits provided are created as a result of collective bargaining agreements negotiated between LOCAL 54 and various employers. These negotiation and subsequent contracts define the level of contributions to be made on behalf of participating employees as well the classes of employees who are covered by said contributions and entitled to benefits as a result thereof. Furthermore, since an employer's obligation to pay contributions is based on the contract negotiated by LOCAL 54, LOCAL 54 is looked to by these funds for the proper interpretation and application of the contracts to determine the contributions which are due to the funds thereunder.

The governing board of these funds is comprised of a Board of Trustees. LOCAL 54 participates in the Board of Trustees by virtue of Frank Gerace, President of LOCAL 54 who is a Union Trustee of both the Health and Welfare and Pension Funds. Furthermore, LOCAL 54 and the contributing employers form a Local Coordinating committee which investigates, analyses and recommends

to the Fund Consultants the level of benefits to be provided under these plans.

Relative to the Health & Welfare Plan, if contributions from participating employers would cease, the plan would terminate since there would be no contributions to provide future benefits. Only those claims which had been filed up to the date of cesation of contributions could be honored. If contributions were to cease on behalf of LOCAL 54 members, the Local's Health & Welfare Plan would simply cease to exist. If contributions were to cease relative to the members of LOCAL 54 who are employed by casino hotel employers, there would be a termination of all Health & Welfare Benefits for the casino hotel employees represented by LOCAL 54 and their dependents. This would also impact adversely on the members of LOCAL 54 who are employed by non-casino employers in that there would be a drastic reduction in benefits for said employees because of the concept and structure of group insurance plans.

Relative to the Pension Plan and benefits, a cesation of contributions by participating employers, such as casino hotel employers, would trigger the complete withdrawal of said employers from the Pension Plan under ERISA and Multi-Employer Pension Act rules and regulations. This would result in withdrawal liability on the part of these employers. Furthermore, all Casino hotel employees who did not have ten years of service and participation in the Pension Plan would lose all of the benefits which they had accrued to date. In addition, a cesation of contributions by casino hotel employers would impact on all of the other employers across the country who contribute to the plan including the non-casino employers with whom LO-

CAL 54 has contracts and who are obligated to contribute to the Pension Plan. Under the terms of the plan, if any individual casino employer's withdrawal liability was less than 100,000.00, said employer would be relieved of this liability and it would be passed on to the liabilities of the remaining employers.

The impact of the cesation of contributions and the loss of benefits resulting therefrom would affect not only the members of LOCAL 54 but also their dependents. There are currently approximately 10,000 members covered by LOCAL 54 Health and Welfare plan and at least 20,000 individuals, including dependents who actually receive the benefit of this plan. Relative to the International Pension Plan, there are approximately 30,000 participants all over the country, including the members of LOCAL 54, and approximately 2500 contributing employers.

The benefits with the plan participants and their beneficiaries receive and which will be terminated by the cesation of the payment of contributions by casino hotel employers are described in full by the attached summary plan descriptions for the Health and Welfare Pension and Dental Plans which are attached hereto as exhibits A and B.

Both plans are section 302 Taft Hartley Plans and are subject to the regulatory provisions of the Employee Retirement Income Security Act.

I have read the above statement, of which there are four pages, and I hereby swear that the contents hereof is true and correct to the best of my knowledge and belief.

/s/ Michael Gantert

Sworn and subscribed before me
this 27th day of November, 1981
/s/ GERTRUDE A. WALDT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 8, 1984

(SEAL)

P-6 AFFIDAVIT OF LINDA ATENE

State of New Jersey |
ss
County of Atlantic |

AFFIDAVIT

LINDA ATENE, of 1608 Acorn Place, Clementon, New Jersey, being duly sworn according to law deposes and says that the following facts are true and correct to the best of her knowledge, information and belief. She is an employee of Local 54, Hotel Employees Restaurant Employees AFL-CIO, and works as a job dispatcher. Said position is created as a result of the requirement in the collective bargaining agreements maintained with the hotel casinos that Local 54 structure, maintain, and conduct a hiring hall and exclusive job referral service. In that capacity, deponent is the actual dispatcher who receives telephone calls from the personnel offices of the various hotel casino and other employers, requesting referral of people in the classifications necessary for an interview for hiring on a job. All employees in the bargaining units of the collective bargaining agreements must be hired in this manner. Dependent, as the dispatcher, conveyes the order for employees to four additional clerical employees, who register applicants, and thereafter make telephone

calls seeking available employees, forward the names to dependent who in turn advises the appropriate personnel offices, which then confirm to deponent that the people referred to for interview have been found qualified or, if not, request deponent on behalf of Local 54 to forward additional persons for employment.

Deponent dispatches approximately 75 employees a day for jobs during the normal season and to the best of deponent's estimation, approximately 15,000 persons a year are dispatched and hired in full time capacities in the various hotel casinos pursuant to the hiring hall and referral services. All of the jobs are normally full time jobs, but there is a substantial job turn over which requires repetative referral in order to maintain both the employment continuity, and the services required by the employer. All of the employees responsible for the duties of the hiring hall and job referrals are full time employees of Local 54 and their wages and fringe benefits are totally dependent upon the union's ability to make such payments, which ability in turn is dependent upon the dues income, most of which comes from the casino hotel industry. In addition, the duties of the hiring hall and referral services operate from the union hall and the extensive facility provided therein is essential to the operation of this service, as are the extensive telephone facilities which similarly are provided.

/s/ Linda Atene

SWORN TO AND SUBSCRIBED
TO THIS 27th DAY
OF NOVEMBER 1981.

/s/ GERTRUDE A. WALDT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 8, 1984.

(Seal)

P-7 AFFIDAVIT OF CAROLYN BISHOP

State of New Jersey |
ss
County of Atlantic |

AFFIDAVIT

CAROLYN M. BISHOP, of 1820 Lincoln Avenue, Atlantic City, New Jersey, being duly sworn according to law deposes and says that the following facts are true and correct to the best of her knowledge, information and belief. She is a full time employee of Local 54, Hotel Employees Restaurant Employees AFL-CIO, and serves in the full time capacity of a grievance hearing coordinator. Deponent's job consists of coordinating all written grievances on behalf of members of Local 54, whether or not they result in hearings. In that capacity, deponent is not only fully personally familiar with all of the records of grievances, but has participated exclusively in the allocation of servicing of such grievances to the respective business agents, and the coordinating and correlating of such grievances throughout the various steps of the grievance procedure into the arbitration process. The grievance procedure is found in the various collective bargaining agreements of all of the casino hotels as well as the collective bargaining agreements of non casino hotels. From January 1, 1981 to October 31, 1981, there have been approximately 900 to 1,000 employee member grievances processed by Local 54 against alleged abuse of rights by employers in the casino hotel industry. In addition to this number of grievances, there are approximately one-quarter that number normally processed which do not reach the written stage but are resolved at the first

pregrievance level as the result of verbal discussions and communications. Grievance processing is the only means under the collective bargaining agreement for protecting the rights of employees, and the obligations due them by the employers, and of protecting them from unjust discipline, violation of seniority rights, violation of classification rights, improper denial of wages due and other conditions protected by the labor contract. These conditions include transfer rights, shift change rights, vacation benefits, vacation selections, and all of those matter to which reference is made in the labor contract, one of which is attached hereto and marked Exhibit 1.

Similar collective bargaining agreements with the same type of grievance and arbitration procedures appear in all of the casino hotel contracts, and in most of the collective bargaining agreements of non casino hotel employers. Of the between 900 and 1,000 written employee member grievances processed from January 1, 1981 to October 31, 1981, approximately 275 involved the alleged improper termination of employment, and during said period of time, there were dozens of grievances involving pay disputes, shift changes, seniority violations, and all other disagreements under which employees had complaints which required processing.

In addition to the processing of grievances, deponent is responsible for making certain that some tracking is kept of those cases which go to final, impartial, and binding labor arbitration. In this regard, there have been since January 1, 1981 to October 31, 1981 in excess of 30 grievances so referred, a number of which have completed formal hearings before outside impartial arbitrators. By virtue of the actions of Local 54 in processing grievances

in the grievance procedure, and by virtue of grievance resolutions as well as arbitration awards in the year 1981 to date, there have been recovery of damages for the benefit of members in excess of $200,000, all of which has been distributed to those members whose rights have been in this calendar year, found to be violated.

In providing the coordination and servicing of the grievance procedure, deponent aids nine full time business agents, whose job it is to actually perform the service of grievance adjustment, and at the present time, deponent has a co-hearing coordinator, who serves a similar function. Because of the sheer number of problems that have to be handled, the work which hitherto was deponents exclusively is now being shared by a co-employee.

Deponent and her co-employee, Mary Anne Garrity, as well as all of the business agents and all of the officers and other representatives who perform the services of the grievance procedure are full time employees of the union who depend upon wages and fringe benefits for their daily livelihoods which wages and fringe benefits are derived solely from the union dues paid by members to Local 54. In addition, the costs of the impartial arbitrators, the costs of the attorneys required to represent the union in the grievance and arbitration procedure and all related costs are borne solely by the union treasury, which is made up completely of income derived through the payment of union dues. In the event of a cessation of dues income, there would no means to continue the representation as aforementioned, and there would be a denial to thousands of employees of protection against unjust discharge, lose of seniority rights, fringe benefits,

employment opportunities, and the other rights secured by the contract.

/s/ Carolyn M. Bishop

SWORN TO AND SUBSCRIBED
TO THIS 27th
DAY OF NOVEMBER, 1981.
/s/ GERTRUDE A. WALDT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 8, 1984.
(Seal)

P-8 AFFIDAVIT OF GAIL BOLTEN BROWN

State of New Jersey |
| ss
County of Atlantic |

AFFIDAVIT

GAIL BOLTEN BROWN, of 508 North South Carolina Avenue, Atlantic City, New Jersey, being duly sworn according to law deposes and says that she is fully authorized to take this affidavit and that all of the following facts are true and correct to the best of her knowledge, information and belief.

Deponent is an employee for Tex-Com Inc., a data processing service which provides the requisite data processing and keeping of the necessary books and records for the Local 54 Hotel Employees Restaurant Employees Severance Fund. The Severance Fund is a jointly administered employee benefit fund, which exists pursuant to the collective bargaining agreements in all of the hotel casinos as well as some non casino collective bargaining agreements. The Severance Fund covers 10,000 casino em-

ployees. A copy of the Trust Agreement for the Severance Fund is attached hereto and marked Exhibit 1.

There are presently six trustees who conduct the business of the Severance Fund and are responsible for all decision making. Three of the trustees are from the union sponsors of the Fund, and three of the trustees are from the employer sponsors of the Fund the three union trustees are Frank Gerace, President of Local 54, Evelyn Zarus, Secretary-Treasurer of Local 54, and Al Daidone, Vice President of Local 54. Local 54 under the trust agreement and in fact has the sole responsibility to name the trustee.

Under the collective bargaining agreement, Local 54 bargains with employers for a set contribution to the Severance Fund, which currently in the casino hotel contracts is $.15 per hour per employee. The trustees are responsible for the day to day functioning of the Fund, the collection of delinquencies, the setting of policy, and the ascertaining of proper investments and return on the monies for the protection and benefit of the beneficiaries.

The Local 54 Severance Fund is subject to reporting requirements under the Employee Retirement Income Security Act and to the extent of being so subject, complies with such requirements, in addition to having complied with the necessary qualifications under the Internal Revenue Service regulations. This Fund is solely a Local 54 matter with its employers, and is not in any way related to any of the Funds of the International Union.

/s/ Gail Bolten Brown

Sworn to and Subscribed to this 27th day of November, 1981.

/s/ Gerturde A. Waldt

(SEAL)

P-9 AFFIDAVIT OF ANNA MARY DITMIRE

State of New Jersey |
| ss
County of Atlantic |

AFFIDAVIT

ANNA MARY DITMIRE, of 214 Ocean Heights Avenue, Somers Point, New Jersey, being duly sworn according to law deposes and says that she is authorized to take the instant affidavit and that all of the following facts are true and correct to the best of her knowledge and belief.

Deponent is employed as the office manager of Local 54, Hotel Employees Restaurant Employees AFL-CIO, and has held that capacity for the past two and a half years. Prior to that time deponent was the bookkeeper for said local union since the early 1970's and prior to that time was employed by the predecessor union to Local 54, Local 508.

Deponent's duties as office manager include participating in every aspect of the union's activity from the point of view of office management, overseeing employees, participating in reports, being responsible for costs and expenditures, and all of the other duties relating to responsibility for the day to day functioning of the institution. In that regard, deponent is fully familiar with all of the records of the local union, and has participated in the normal course of such record keeping on a day to day basis, and has overseen and does oversee such record keeping by others. Deponent is further familiar with the full scope of the union's activities, and the history of Local 54.

Local 54 is a successor to two prior local unions in the same geographic area, i. e., Local 508, which was chartered in 1918, and Local 491, which was chartered in 1902, as well as Local 170, which was chartered in 1940. Local 54's geographic jurisdiction bestowed upon it by virtue of its International Union's Charter is Atlantic, Cape May, and Ocean Counties as well as all areas between such counties and the Delaware River including, Cherry Hill, New Jersey. Its traditional historic jurisdiction had commenced as Atlantic and Cape May Counties and it has always, pursuant to International Charter, occupied such geographic jurisdiction. The local union exists, not only pursuant to its own Constitution and Bylaws, but also pursuant to the International Union Constitution of which it is an affiliate, a copy of which is attached hereto and marked Exhibit 1.

Local 54 exists for the purpose of representing employees in the hotel, restaurant and bartending and related industries in the capacities of housekeeping, kitchen, culinary and service work, and is chartered for the purpose of representing such employees for purposes of wages, hours and working conditions. Employees participate in the functioning and affairs of Local 54 and participate in the formulation of contract proposals and contract ratification.

There are presently approximately 12,000 members of Local 54, of which approximately 8,000 are members employed in the Atlantic City Casino Hotels, and the balance are employed in various non casino hotels, restaurants, bars, amusement parks, and related activities. Most of said members are covered by collective bargaining agree-

ments negotiated with their employers which set forth the wages, hours, and working conditions regulating their industry as well as the dues paying obligations, and the various employee fringe benefit requirements and protections. In the casino hotel industry there is a relatively standard collective bargaining agreement, which contains for each of the present eight functioning casino hotels, similar wages, hours, and conditions. A copy of a typical Casino Hotel Collective Bargaining Agreement is attached to and marked Exhibit 2.

The remaining casino hotel collective bargaining are either identical or substantially identical and in all areas of relevance to the instant affidavit are specifically the same. All of the eight presently operating casino hotels in Atlantic City are under contract with Local 54, and all of the employees in the described bargaining unit are members of Local 54.

Local 54, in order to provide the service required for its membership, maintains 38 full time officers, business agents, and employees, at a payroll cost which is currently in excess of $12,000 a week. Local 54 also owns a union hall and building which is used for its offices, headquarters, and meeting rooms on which there exists a mortgage in the amount of $337,000. The total monthly budget for the operation of all of Local 54's services including the required per capita payment to the International Union is approximately $120,000 a month. The sole income received by Local 54 comes from union dues and initiation fees, in which the total amount, consisting primarily of dues, is approximately $130,000 a month, of which approximately 85% comes from the membership dues paid by members employed in the casino hotels.

The average per capita dues payment per month on behalf of individual members to the International Union is $3.000 or approximately $33,000 a month.

Attached hereto and marked Exhibit 3, is the 1980 "LM-2" required by virtue of the Labor Management Reporting and Disclosure Act of 1959, which provides a reflection of last years operating budget.

In the event of a failure to pay per capita tax to the International Union which payment comes strictly from the dues paid by members, the International Union is compelled to exercise a trusteeship, and cease the charter of the local union; those members in whose behalf there is not a good standing payment to the International Union, will lose good standing and with it lose their International Union membership, their death benefits, and their transfer rights to other local unions.

In the event of a cessation of dues income to Local 54 from the hotel casinos, it will be impossible to maintain the union hall, to service the union membership either in the casino hotels or in the non casino hotel areas, and as a result the collective bargaining agreements will not be enforceable. The monies and income of Local 54 are extended solely for the salaries and benefits payable to those persons who provide the services to the membership, and to all of the expenses necessary in order to administer collective bargaining agreements, bargain for new collective bargaining agreements, organize the unorganized, process grievances, and perform the other responsibilities of a collective bargaining agent.

Local 54 files the required LM-1 and LM-2 Reports under the Labor Management Reporting and Disclosure Act. Moreover, as required by said act and by the Consti-

tution and Bylaws, the membership nominates and elects by secret ballot all officers of the local and votes on ratifications and rejections of labor contracts.

/s/ Anna Mary Ditmire

SWORN TO AND SUBSCRIBED
TO THIS 27TH DAY
OF NOVEMBER, 1981.
/s/ Gertrude A. Waldt
Notary Republic

TRANSCRIPT OF DECEMBER 1, 1981, P 38

In fact, I would ask that the court take judicial notice of the fact that the National Labor Relations Board in fact assumes jurisdiction of each of these hotel casinos and in fact conducts representational and unfair labor practice proceedings and has conducted them through the decision and election and I so represent to the court and the court can take judicial notice of these following cases: Number —Caesar's Boardwalk Casino, 4RC14273; Caesar's Boardwalk Casino, 4RC14406; 4RC13987; 4RC13768; 4RC13845; Resorts International, 4RC13549; 4RC13508; 4RC14050; 4RC13232; 4RC13911; Bally Park Place, 4RC14160; 4RC14095; 4RC14162; 4RC14233; 4RC14496; 257NLRB number 132; Brighton, now the Sands, 4RC14326; 4RC14471.

I ask you to take judicial notice and by taking those documents the state similarly stipulates that the National Labor Relations Board has in fact exercised representational jurisdiction in unfair labor practice jurisdiction over the casinos, as a matter of fact. You don't have to lump them together—

The Court: Any objection to that?

Mr. Parrillo: I haven't seen any of the documents he has referred to.

The Court: I will offer you the opportunity.

NO. 83-498

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR APPELLANTS

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* Counsel of Record

Dated: January, 1984

Adams Press Corp., 10 Park Place, Newark, New Jersey 07102—(201) 623-5611

Question Presented

Whether the State of New Jersey, as part of a larger regulatory scheme whose purpose is to strictly and effectively control its sensitive and vulnerable casino industry, can require, consistent with federal labor policy, the registration of only those labor unions representing employees of operating casino hotels in Atlantic City and the removal from office in those specific unions of certain individuals who, after a formal hearing, are found disqualified by reason of certain statutorily-proscribed conduct, including enumerated criminal convictions and involvement with organized crime, which conduct would not necessarily disqualify union officials under federal labor law.[1]

---

[1] The parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Martin Danziger, Acting Chairman; Donald Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner, constituting the Casino Control Commission, State of New Jersey; G. Michael Brown, Director, Department of Law Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey and Thomas Kean, Governor, State of New Jersey, Appellants herein; and Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, Appellees herein. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 331, were intervenors in the proceeding before the United States District Court for the District of New Jersey, but did not participate in the proceeding before the Court of Appeals for the Third Circuit.

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D—Opinion of New Jersey Casino Control Commission 131a

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NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3d Cir. 1983 (J.S. App. 1a-77a).[2] The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) (J.S. App. 78a-128a).

The unreported opinions of the New Jersey Casino Control Commission have been reprinted (J.S. App. 131a-205a, and at 208a-216a).

Jurisdiction

This is an action for declaratory, injunctive, and monetray relief, brought under 28 U.S.C. §1331, 1337 and 1343 (1976 & Supp. V 1981), in which the District Court refused to preliminarily enjoin the enforcement of a portion of New Jersey's Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 78a-122a).

On June 6, 1983 the United States Court of Appeals for Third Circuit reversed, holding that this statute was preempted by federal labor law, and was therefore invalid under the Supremacy Clause of the Constitution (J.S. App. 1a-37a; J.S. App. 217a-219a). A timely petition for rehearing or rehearing en banc was denied on June 30, 1983 (J.S. App. 220a-222a). A notice of appeal to this Court was duly filed in the Court of Appeals on July 20, 1983 (J.S. App. 224a-229a).

This appeal was docketed in this Court on September 23, 1983, within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. §1254(2) (1976). The following cases sustain the Court's jurisdiction to review the judgment on appeal in this case: *Belknap, Inc.* v. *Hale,* 103 S.Ct. 3172, 3176 n. 5 (1983); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301-303 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (1975); *Construction Laborers* v. *Curry,* 371 U.S. 542, 548-552 (1963).

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[2] Throughout this brief, references to the Joint Appendix to the Jurisdictional Statements will be given in the form "J.S. App. 1a" etc. References to the Appendix filed herewith will be distinguished by using the form "A.1" etc.

Constitutional and Statutory Provisions Involved

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 235a.

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), provides in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . .
>
> during or for five years after the termination of his membership in the Communist Party, or for

> five years after such conviction or after the end of such imprisonment . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 236a-237a.

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), provides in relevant part:

> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, exortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is the later . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 238a-240a.

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of Jan. 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any

> and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 241a-245a.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 246a-247a.

Section 86 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) is reprinted in full in the appendix to the Jurisdictional Statement at 248a-255a.

NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR APPELLANTS

Statement of the Case

By referendum held in 1976, the electorate of New Jersey amended their constitution to permit the legislative authorization of casino gambling, geographically limited to Atlantic City, in an effort to revitalize that decaying resort area as well as to increase revenues devoted exclusively to the State's elderly and handicapped residents. N.J. Const. (1947) art. 4, §7, ¶2(D) (West Supp. 1983-1984); *Knight* v. *City of Margate*, 86 N.J. 374, 380, 431 A. 2d 833, 836 (1981).

Charged with the responsibility for implementing the constitutional mandate, the New Jersey Legislature had before it many studies regarding the possibilities for crime and corruption associated with the institution of this industry. *E.g. Second Interim Report of Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations on Casino Gambling by the New Jersey State Commission of Investigation* (April 1977). Responding to these dangers, and to foster public confidence and trust in its system of controls, the Legislature enacted the New Jersey Casino Control Act, a comprehensive licensing scheme "designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries." N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984). *See Knight* v. *City of Margate, supra,* 86 N.J. at 380-383, 431 A. 2d at 837.

To enforce this scheme, the Legislature created two separate and distinct State agencies: the Division of Gaming Enforcement ("Division"), a branch of the New Jersey Attorney General's Office, and the New Jersey Casino Control Commission ("Commission"), an independent *quasi*-judicial administrative body. Together, these agencies have the power and duty to investigate, license, supervise and pervasively control legalized gambling in all its aspects. N.J. Stat. Ann. §§50, 76, 80-95 (West Supp. 1983-1984).

In order to further assure that the goals of the Act would be realized, the Legislature imposed on those business entities seeking to own and operate casino hotels strict licensure requirements, and mandated that such businesses establish by clear and convincing evidence their financial responsibility, and their good reputation for honesty and integrity, N.J. Stat. Ann. §5:12-84(a)-(c) (West Supp. 1983-1984). Furthermore, each officer, each director and each person having the ability either to control a corporate casino company or elect a majority of its board of directors also is required to demonstrate by clear and convincing evidence his financial responsibility, business ability, and good character, honesty and integrity, N.J. Stat. Ann. §5:12-85(c) (West Supp. 1983-1984). Finally, with respect to the casino operator, the *bona fides* of its parent and each of its financial backers must also be demonstrated, N.J. Stat. Ann. §5:12-84(b), 85(d)-(e) (West Supp. 1983-1984).

The licensure scheme also extends beyond the casino company itself to persons involved in the operation of the casino, N.J. Stat. Ann. §5:12-9, 89 (West Supp. 1983-1984) as well as persons employed by the casino hotel who have access to the casino floor, N.J. Stat. Ann. §5:12-7, 90 (West Supp. 1983-1984); a registration process pertains to casino hotel employees whose functions do not require access to the casino itself, N.J. Stat. Ann. §5:12-8 and 91 (West Supp. 1983-1984). In addition, the Legislature prescribed licensure for all persons and entities supplying the casino hotels with goods or services on a regular and continuing basis, N.J. Stat. Ann. §5:12-12, 92 (West Supp. 1983-1984), and required that the Commission scrutinize each and every contract into which a casino hotel enters to assure the suitability of the other parties involved. N.J. Stat. Ann. §5:12-104(b) (West Supp. 1983-1984). The point of all of these stringent standards and regulations is to enable the Commission to fulfill its most important and essential mission, *i.e.* to assure that licenses, certificates and permits not issue to, nor be held, directly or indirectly, by unqualified or unsuitable persons, N.J. Stat. Ann. §5:12-64 (West Supp. 1983-1984).

As part of this larger and overall scheme of regulating the gaming industry, the Legislature also established a registration system for those labor organizations representing, or seeking to represent, state-licensed or state-registered casino hotel employees. N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a). This system relies for its enforcement on five distinct steps. First, each labor organization and its officials must register, *i.e.* file certain specified information, annually with the Commission. Second, the Division investigates the officials of a registered labor organization, in order to determine whether any such official is disqualified in accordance with the standards set forth in Section 86 of the Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) (J.S. App. 248a-255a), and reports that fact to the Commission. Third, in the event of an unfavorable report from the Division, the Commission must hold an adversarial administrative hearing, according the affected labor organization and officials full rights to participate as parties therein. See N.J. Stat. Ann. §5:12-94, 107 (West Supp. 1983-1984). Fourth, based on the record adduced at the hearing, the Commission must determine whether any official of the labor organization is indeed disqualified and, if so, whether the disqualification should nevertheless be waived consistent with public policy and the interests of justice. Finally, in the event an official is disqualified, the disqualification is not waived, and the official remains in office, the Commission has the authority to preclude the affected labor organization from receiving dues from any employees of a casino hotel or from administering any pension or welfare funds on their behalf.

As noted, the qualifications of labor officials are measured solely by the criteria enumerated in Section 86 of the Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) (J.S. App. 248a-255a), which enunciate certain statutorily-proscribed conduct. Encompassed within these criteria are disqualification for conviction of any of a series of enumerated crimes, N.J. Stat. Ann. §5:12-86(c) (West Supp. 1983-1984) (J.S. App. 248a-253a), and one's membership in, or operation as a strawman for, organized

crime, N.J. Stat. Ann. §5:12-86(f) (J.S. App. 254a).[3] All of the other licensure, registration, and qualification schemes referred to above also incorporate these very same disqualifying criteria, and in most instances, but exclusive of casino labor organizations,[4] encompass as well the affirmative burden of proving the positive suitability criteria of good character, honesty and integrity. See *e.g.*, N.J. Stat. Ann. 5:12-92(b), -90(b), -89(b), and -85(c) (West Supp. 1983-1984).

In accordance with and pursuant to Section 93, Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), a labor union representing approximately 8,000 casino hotel employees,[5] registered with the Commission as did its president, Appellee Frank Gerace, and other officers, agents and prin-

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[3] The provisions of Section 86 noted in the text were the ones which occasioned the disqualification of union officials in this case. Other disqualification criteria, not applied herein, include an individual's failure to provide information required by the Act or the supplying of false information thereunder, N.J. Stat. Ann. §5:12-86(b) (J.S. App. 248a); current prosecution for any crime for which conviction would constitute a disqualification, N.J. Stat. Ann. §5:12-86(d) (J.S. App. 253a); pursuit of economic gain in an occupational manner in violation of criminal or civil public policy, N.J. Stat. Ann. §5:12-86(e) (J.S. App. 254a); commission of acts constituting disqualifying crimes whether or not such acts had been, or could be, prosecuted criminally, N.J. Stat. Ann. §5:12-86(g); and contumacious defiance of any legislative or other official state or federal body engaged in the investigation of crimes relating to gaming, official corruption, or organized crime activity, N.J. Stat. Ann. §5:12-86(h) (J.S. App. 255a).

[4] N.J. Stat. Ann. §5:12-86(a) (J.S. App. 248a), which generally disqualifies an applicant for failure to affirmatively prove by clear and convincing evidence his good character, honesty and integrity is of no real effect with regard to union officials because such officials have no affirmative obligation imposed by the Act to demonstrate "good character". Rather, as the Commission held in the present case, the burden of demonstrating a Section 86 disqualification of a labor leader falls squarely upon the Division (J.S. App. 136a).

[5] These 8,000 casino hotel employees represent fully three-fourths of the union's total membership (J.S. App. 4a).

cipal employees. Thereafter, and as the result of its independent investigation, the Division, on May 11, 1981, filed a report with the Commission indicating possible grounds for disqualification of various union officers and agents, including Gerace, based upon their criminal convictions and/or organized crime associations. A hearing before the Commission to consider the Division's allegations was scheduled to commence in September 1981 (J.S. App. 4a-7a).

On August 17, 1981, Local 54 and Gerace as plaintiffs filed in the United States District Court for the District of New Jersey a complaint for declaratory, injunctive, and monetary relief, together with a motion for a preliminary injunction (A. 4-20, 49-54). The plaintiffs urged that N.J. Stat. Ann. §5:12-93 was preempted by federal labor law, and that they would be irreparably harmed if the Commission hearing were permitted to proceed as then scheduled (A. 49-54). Faced with the possible issuance of a temporary restraining order, the Commission agreed to defer its administrative hearing pending the District Court's ruling (J.S. App. 8a).

On March 22, 1982, the District Court issued a ruling denying the plaintiffs' motion for a preliminary injunction. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317 (D.N.J. 1982) (J.S. App. 78a-122a). While appeals of this ruling were pending in the United States Court of Appeals for the Third Circuit, and because no preliminary injunction or injunction pending appeal had been granted, the Commission convened a hearing. Prior to the commencement of that hearing, the Division filed a supplemental report with the Commission alleging that two additional union officials were disqualified by virtue of their criminal records (J.S. App. 135a-136a). The Commission hearing, which began on June 8, 1982, and in which Local 54 and Gerace fully participated, focused on the matters raised in the two Division reports and concluded on September 13, 1982.

After reviewing the testimony of the witnesses and the documents entered into evidence, the Commission issued a

final decision, dated September 28, 1982, declaring that certain union officers and agents were disqualified (J.S. App. 131a-197a). Appellee Gerace and one other official were disqualified because they were associates of organized crime members and conducted their union affairs under the influence of those organized crime members (J.S. App. 175a-176a). A union agent was also disqualified because of his conviction for extorting money, while an Atlantic City public official (J.S. App. 193a-196a).

As a result of its findings of disqualification as to the three officials, the Commission issued an order pursuant to N.J. Stat. Ann. §5:12-93 providing in substance that if any of the disqualified individuals remained as an officer, agent or principal employee of Local 54 as of October 12, 1982, the union would thereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent (J.S. App. 206a-207a). Additionally, on October 12, 1982, the Commission issued a supplemental opinion which concluded that the additional sanction available to it under N.J. Stat. Ann. §5:12-93, *i.e.* the prohibition on the administration of pension or welfare funds, would not be applied to Local 54 based on the record presented in this case (J.S. App. 208a-215a). Enforcement of the order banning dues collection was enjoined by the District Court, awaiting resolution of the pending appeals (J.S. App. 129a-130a).

All parties subsequently filed with the Court of Appeals a joint motion to supplement the record on appeal with the decisions and order of the Commission, which motion was granted. On June 6, 1983, the Court issued its 2-1 decision in this matter. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger*, 709 F.2d 815 (3d Cir. 1983) (J.S. App. 1a-77a).

The majority held in essence that the disqualification standards for union representatives and the dues collection ban established by N.J. Stat. Ann. §5:12-93 were both preempted by Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976), and that

the prohibition on the administration of pension or welfare funds was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), §514, 29 U.S.C. §1144 (1976). The order appealed from was therefore reversed, and the case remanded for the entry of an order enjoining the Commission and Division from taking any further action to enforce any part of N.J. Stat. Ann. §5:12-93 (J.S. App. 16a-37a). In an opinion dissenting in part, Judge Becker agreed with the majority that ERISA precluded the Commission from regulating the management of welfare and pension funds. He disagreed, however, that the remainder of N.J. Stat. Ann. §5:12-93 was precluded (J.S. App. 38a, 72a-77a).

A timely petition for rehearing or rehearing en banc was filed with the Court of Appeals, which denied the petition by an evenly-divided vote of 5-5 (J.S. App. 220a-222a). The instant appeal to this Court was docketed within 90 days thereafter, and probable jurisdiction was noted on November 28, 1983 (A. 57). The case was consolidated with the appeal by the Casino Control Commission in *Danziger, etc., et al.* v. *Hotel and Resaurant Employees and Bartenders International Union Local 54, et al.*, No. 83-573 (A. 57-58).

Summary of Argument

In situations where a state enactment is challenged under the Supremacy Clause as being preempted by federal law or policy, the Court has adopted and employed a flexible approach which seeks, whenever possible, to reconcile the operation of both regulatory systems with one another. *See, e.g., Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 103 S.Ct. 1713 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973). This approach is no less reflected in the Court's decisions in the labor law field.

The rule there applied is that if the conduct a State seeks to regulate is protected or prohibited by federal labor law, otherwise applicable state law and procedures are ordinarily preempted. *San Diego Bldg. Trades*

Council v. *Garmon*, 359 U.S. 236, 245 (1959). Nevertheless, state regulation may still be sustained, absent compelling congressional direction, where the behavior to be regulated touches interests deeply rooted in local feeling and responsibility. *Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172, 3177 (1983). Resolution of the question whether state regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the NLRB's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the challenged regulation to the State as a protection to its citizens. *Local 926, Int'l Union of Oper. Eng.* v. *Jones*, 103 S.Ct. 1453, 1459 (1983).

The present case involves the preemptive scope of Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976) (J.S. App. 235a), which in part guarantees employees the right to "bargain collectively through representatives of their own choosing". Another provision of national labor law, Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (J.S. App. 236a-237a), establishes federal disqualification standards for officials of labor organizations. The question before this Court is whether New Jersey, as part of its comprehensive regulation of its casino gambling industry, may enforce more stringent standards of conduct than those applicable under federal law for officials of unions representing state-licensed employees engaged in that one localized industry. N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a). Resolution of the issue involves the Court in an analysis of the congressional intent reflected in the NLRA and the LMRDA, and in an assessment of its two most significant prior decisions on this subject, *Hill* v. *Florida*, 325 U.S. 538 (1945), and *DeVeau* v. *Braisted*, 363 U.S. 144 (1960).

In *Hill*, the Court had before it a state statute, applicable to all unions operating within the jurisdiction, which mandated the filing of certain information and which pur-

ported to establish broad qualification standards including "good moral character" for officials of such unions. Labor organizations which failed to meet their filing obligations, or which employed unqualified agents, were subject to an injunction prohibiting them from engaging in collective bargaining. Under these circumstances the Court held that the state requirement of filing information did not conflict with federal labor law, but that the disqualification standards for union office imposed by the state enactment, and the sanction imposed for failure to meet those standards, were preempted by Section 7 of the NLRA. 325 U.S. at 539-544.

Three events occurred subsequent to *Hill* which place that decision in proper perspective. First, Congress in 1953 approved a compact between New York and New Jersey, designed to attack the problems of crime and corruption which had theretofore plagued the State's common waterfront, which relied for its enforcement on a statute establishing stringent disqualification standards for officials of waterfront labor unions. Second, reacting to the disclosures of the McClellan Committee regarding racketeering, crime and corruption in the labor movement, Congress itself established criteria disqualifying certain persons from holding union office as part of the LMRDA in 1959. Finally, this Court's own approach to preemption evolved from one weighted heavily toward federal preclusion to one more amenable to the concurrent exercise of state regulatory authority. It was against this background that the Court revisited the Section 7 preemption issue in *DeVeau* v. *Braisted, supra.*

In *DeVeau,* the Court considered the validity of Section 8 of the Waterfront Commission Act, which was enacted in furtherance of the bi-state compact referred to above. The statute barred any convicted felon from serving as an official of a waterfront labor union, and enforced its ban by precluding a union employing such a disqualified official from collecting dues from waterfront empolyees. The claim advanced before this Court was that, to the extent Section 8 restricted waterfront employees' choice of

bargaining representatives, it was preempted by the NLRA. 363 U.S. at 144-145, 151-152.

In an opinion for a four-Justice plurality, Justice Frankfurter first rejected the notion that Section 7 of the NLRA excluded every state policy restricting the complete freedom of a group of employees to designate representatives, finding instead that the preemption question was not "a problem in physics but one of adjustment," and that the operation of Section 8—in light of its background and purpose, *i.e.* combatting local crime infesting a particular industry—did not frustrate national labor policy. 363 U.S. at 151-155. Justice Frankfurter also found that Section 504(a) of the LMRDA, which established federal disqualification standards for holding union office, did not preclude the imposition of more stringent standards by the States, such supplementary state legislation being affirmatively permitted by Sections 603(a) and 604 of the LMRDA as well. 363 U.S. at 155-157. Accordingly, Section 8 of the Waterfront Commission Act was upheld in its entirety, 363 U.S. at 160, a judgment concurred in by Justice Brennan, 363 U.S. at 160-161.

Based upon the foregoing, the Appellants contend that Section 93 of the New Jersey Casino Control Act should also be upheld in its entirety. The statute's registration provisions, which initiate the State's investigatory and regulatory process, are similar to the information filing requirements permitted in *Hill* v. *Florida, supra,* 325 U.S. at 543, which should be dispositive herein. As for the standards of conduct applied by Section 93 to officials of casino unions, these standards are narrowly focused upon criminal or *quasi*-criminal activity, and are designed to further the State's deeply-rooted and compelling interest in preventing corruption in its casino gaming industry. Applying the balancing test established by this Court, the restrictions imposed by Section 93 upon casino hotel employees' right to select union leaders—which only go minimally beyond those restrictions on choice already imposed by Congress itself in Section 504(a) of the LMRDA—are more than amply justified by the importance of the regu-

lation, confined as it is to this unique and localized industry, as a protection to the State's citizens. The state regulations in issue will not interfere with the jurisdiction of the NLRB, because the aims and functions of the state and federal agencies involved do not overlap and are totally compatible. See *El Dorado, Inc.*, 151 NLRB 579 (1965).

With respect to the sanctions available under Section 93(b) to secure the removal of disqualified casino union officials, these too are valid under federal labor law. The prohibition on the receipt of dues is the same penalty upheld in *DeVeau* v. *Braisted, supra*, 363 U.S. at 145, and does not impermissibly interfere with the performance of the union's functions under the NLRA, *Alabama Federation of Labor* v. *McAdory*, 325 U.S. 450, 466 (1945). As for the ban on administering pension or welfare funds, the question is a closer one because Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144 (1976) (J.S. App. 241a) expressly preempts state laws insofar as they "relate to any employee benefit plan." However, Section 411 of ERISA, in a fashion similar to Section 504(a) of the LMRDA, 29 U.S.C. §1111 (1976) (J.S. App. 238a-240a), also contains standards for the disqualification of fund administrators. It is the position of the Appellants that, in enacting what are in effect more stringent disqualification standards for union officials whose unions also administer employee benefit programs than Congress has imposed directly upon fund administrators, New Jersey is not regulating the funds themselves so as to fall within the preemptive contemplation of ERISA, but is rather permissibly supplementing the federal criteria using the same reasoning employed in *DeVeau*. See *Int'l Longshoremen's Assn.* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1124-1125 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other gds.*, 642 F. 2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981); *Local 1804* v. *Waterfront Comm'n*, 85 N.J. 606, 615-617, 428 A. 2d 1283, 1288-1289 (1981).

ARGUMENT

Section 93 of the New Jersey Casino Control Act is not preempted by federal labor law or policy.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), is a narrowly-drawn statute designed to meet a compelling local interest: the prevention of corruption and organized crime involvement in the State's casino gaming industry through the back door of labor organizations closely associated therewith. This provision was enacted as part of a larger and comprehensive statutory scheme whose sole purpose is to regulate casino gambling in Atlantic City in all its aspects, and decidedly not to intrude in any way upon the delicate bargaining relationship between employees and employers in that industry.

That New Jersey has no interest in regulating labor-management relations within its casino industry, or in the negotiations or terms of the agreements entered into between the parties, is abundantly manifest. Most notably, Section 93 of the Casino Control Act does not prohibit at any point any labor organization from acting as the employees' collective bargaining representative or from performing any collective bargaining functions. Rather, and only as a consequence of having engaged in certain statutorily proscribed conduct, the leadership of such organizations would be required to forfeit their offices or having failed or refused to do so, their union may be barred from receiving dues or administering employee benefit plans. The enforcement provisions of Section 93 serve only to disqualify *individuals* found to have engaged in specifically delineated conduct prohibited by state law; they do not disqualify a labor union *as an organization,* nor could they, admittedly, exclude any union from acting as the collective bargaining agent of casino hotel employees. The removal of disqualified individuals from association with the casino industry is, in substance, the real aim of the Casino Control Act. See N.J. Stat. Ann. §5:12-1(b)(6), 64 (West Supp. 1983-1984).

Viewed in this manner, the issue before this Court resolves itself into one of whether the State of New Jersey, in the context of regulating its casino gaming industry, is preempted from establishing standards of conduct for officials of unions involved in that industry which are more stringent than those standards generally applicable under federal labor law, and from imposing sanctions designed to encourage the removal from union office of those individuals who fail to meet such standards of conduct, though still leaving the ultimate choice regarding compliance in the hands of the union's membership.[6] In succeeding sections of this brief, we shall show that the State is not preempted and that, consistent with the intent of Congress, the concurrent exercises of federal-state authority at issue here are complementary rather than contradictory, and may lawfully coexist without damage to any national policy.

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[6] In the consolidated appeal in this matter, *Danziger, et al.* v. *Hotel and Restaurant Employees, etc. et al.*, No. 83-573, appellant Casino Control Commission also argues that the lower federal courts should have abstained from reaching the merits of the instant controversy in favor of the New Jersey state system. Consistent with the principle of comity underlying *Younger* v. *Harris*, 401 U.S. 37 (1971), appellants herein raised this argument below but do not press it before this Court (a) because of the overwhelming importance of final resolution by this Court of the merits of the preemption issue to New Jersey's ongoing regulation of casino activity; and (b) because we recognize that even had the lower federal courts exercised their discretion to abstain in favor of a preliminary determination of the substantive issue by the state courts, this Court would nonetheless remain the final arbiter. Should the Court, however, determine to address the abstention issue, we urge that the position of appellant Casino Control Commission be adopted but not, of course, at the expense of leaving the question of preemption raised in this case unresolved. Similarly, in the event a decision by this Court on the preemption issue occasions further proceedings below, we submit, for the reasons advanced by our co-appellant, that such proceedings should properly be brought in state rather than federal court.

A. Absent compelling congressional direction, federal labor policy permits the operation of state law touching on interests deeply rooted in local feeling and responsibility.

The doctrine of federal preemption is grounded in the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and provides that when Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 210-211 (1824). In applying the Supremacy Clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. In pursuing this task, the Court has developed various well-settled principles for its guidance.

As an initial matter, when a State's exercise of its police power is challenged under the Supremacy Clause, the Court starts with the assumption that the historic police powers of the State were not to be superseded by a federal statute unless that was the clear and manifest purpose of Congress. *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978). This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the Court. *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977).

Of course, within constitutional limits Congress may preempt State authority by so providing in express terms. *Aloha Airlines, Inc.* v. *Director of Taxation,* 104 S.Ct. 291, 294 & n. 5 (1983). Even absent explicit preemptive language, congressional intent to prohibit state law altogether may be discerned where a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, where the act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or where the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose. *Pacific Gas & Elec.*

Co. v. *State Energy Comm'n,* 103 S.Ct. 1713, 1722 (1983); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Where Congress has neither explicitly nor implicitly displaced state regulation in a specific area, state law will only be nullified to the extent that it actually conflicts with a federal statute. *Fidelity Federal Sav. & Loan Ass'n* v. *de la Cuesta,* 102 S.Ct. 3014, 3022 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963), or where State law "stands as an obstacle to the execution of the full purposes and objectives of Congress", *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). Within this analytical framework, the Court has adopted an approach to preemption which has been flexible in attempting to accommodate and reconcile dual federal and state regulatory schemes. *See, e.g. Exxon Corp.* v. *Eagerton,* 103 S.Ct. 2296 (1983); *Pacific Gas & Elec. Co.* v. *State Energy Comm'n, supra; Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117 (1973); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

The doctrine of preemption in federal labor law has drawn on the foregoing general precepts, shaped primarily by two competing interests. On the one hand, this Court has recognized that the broad powers conferred by Congress upon the NLRB to interpret and enforce federal labor legislation implies that conflicting rules of law, remedy, or administration cannot be permitted to operate. *Farmer* v. *Carpenters,* 430 U.S. 290, 295 (1977). On the other hand, because Congress has refrained from providing specific direction with respect to the scope of displaced state law, the Court has been unwilling to "declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions." *Amalgamated Ass'n of Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 289 (1971).

Experience with several approaches to the preemption problem in the labor law area eventually led the Court

to adopt the general rule set forth in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield."

At the same time, an exception from preemption was recognized "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-244. This exception was said to be based on "due regard to the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." 359 U.S. at 243.

Consistent with such considerations of federalism, the "deeply rooted state interest" exception has been relied upon by the Court to sustain a variety of state activities which otherwise might arguably have been precluded by operation of national law. *See, e.g., Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172 (1983) (contract actions by striker replacements); *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979) (payment of unemployment benefits to strikers); *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978) (state trespass law); *Farmer* v. *Carpenters, supra*, (tort remedy for infliction of emotional distress); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (action for breach of union's duty of fair representation); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966) (action for malicious libel); *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (tort action for wrongful interference with occupation by blocking access to employment); *United Construction Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656 (1954) (tort action founded on threats of violence). In these circumstances, the State's interest in controlling

or remedying the effects of certain conduct has been balanced against both the interference with the NLRB's ability to adjudicate controversies committed to it by federal law and the risk that the State will sanction conduct that federal law protects. *Belknap, Inc.* v. *Hale, supra,* 103 S.Ct. at 3177; *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 197-200; *Farmer* v. *Carpenters, supra,* 430 U.S. at 297. Put another way, as the Court recently observed in *Local 926, Int'l Union of Oper. Eng.* v. *Jones,* 103 S.Ct. 1453, 1459 (1983):

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

In the present case, the Court of Appeals majority declined to engage in any weighing and balancing of federal and state interest, following instead what it believed to be a rule of absolute preemption where activity protected under Section 7 of the NLRA is involved. 709 F. 2d at 828 (J.S. App. 27a-28a). Although this Court has observed that the considerations underlying the arguably protected or the arguably prohibited branches of the *Garmon* doctrine may differ in some respects, *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 190, the Court has also emphasized its refusal to apply the *Garmon* guidelines in a "literal, mechanical fashion," stating: "[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188. It is submitted by the Appellants that the absolute preemption doctrine applied by a majority of the Court of Appeals below is not in accord with prevailing law and that assessment of the competing interests here involved compels the conclusion that the state regulation in issue is not preempted by federal labor policy.

B. Congress did not intend to preempt the states from imposing in some situations restrictions on who may serve as a union official.

As a premise for its decision in this case striking down Section 93 of the Casino Control Act, the Court of Appeals majority expressed its belief that an employee's choice of bargaining representative was absolutely and totally protected by Section 7 of the NLRA from any state infringement. 709 F. 2d at 828-829 (J.S. App. 27a-28a). Appellants submit that the Court of Appeals' view fundamentally misperceives the intent of Congress as interpreted by this Court, for the reasons outlined below.

1. Section 7 of the National Labor Relations Act, which grants employees the right to bargain colectively through representatives of their own choosing, permits some state-imposed restrictions under certain circumstances.

Section 7 of the NLRA, 29 U.S.C. §157 (1976) (J.S. App. 235a), provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." This portion of Section 7 was enacted as part of the original NLRA in 1935,[7] see 49 Stat. 452, and its preemptive scope was initially addressed by this Court in *Hill* v. *Florida,* 325 U.S. 538 (1945).

That case arose from legislation of the State of Florida which undertook to regulate labor unions and their officers, and which prohibited any person from acting as a "business agent" for any "labor organization" without having obtained a State-issued license. To secure such a license, a person had to pay a $1.00 fee and file an application with the Secretary of State. To permit the filing of objections to licensure, the application was held for 30 days; thereafter, the application was submitted to a board consisting of several state officials for a decision. Section 4 of

[7] The section was reenacted as part of the Labor Management Relations Act of 1947, Pub. L. No. 101, ch. 120, §7, 61 Stat. 140 (1947).

the Act provided that no person could be licensed as a business agent of a labor union who had not been a citizen of the United States for more than 10 years, who had been convicted of a felony, or who was not a person of good moral character. As to unions themselves, Section 6 of the Act required every labor organization operating in the State to file an annual report with the Secretary of State disclosing its name, the location of its offices, and the names and addresses of its officers, along with a filing fee of $1.00. A separate provision rendered violation of the Act by any person or labor organization a misdemeanor. 325 U.S. at 540, 556-557.

Pursuant to state law, the Attorney General of Florida sought an injunction in state court against a union and its business agent, Hill, seeking to restrain them from functioning as such until they had complied with the requirements of Section 4 and 6 of the Act. The injunction was granted, over a claim that Sections 4 and 6 were preempted by the NLRA (or "Wagner Act"), and it was this preemption question which was ultimately presented to the Court for review. 325 U.S. at 539-541, 557.

In an opinion for the majority, Justice Black first addressed the relationship between Section 4 of the Florida statute and the rights secured to employees by the NLRA. In his view:

> It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. . . .
>
> Section 4 of the Florida Act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set up by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that §4 limits a union's choice of such

> an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment. . . . No elaboration seems required to demonstrate that §4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [325 U.S. at 541-542].

As an additional consideration, it was noted that operation of the Florida law had already interfered with the collective bargaining process by inspiring an employer to refuse to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. Although the NLRB subsequently ruled that the employer was required to bargain with a properly selected union agent without regard to the agent's compliance with state licensing provisions, the majority held that the union agent's own exposure to punishment for functioning in a collective bargaining role in effect curtailed his freedom to bargain, and that, in and of itself, constituted a frustration of Congressional intent. 325 U.S. at 542.

Finally, with regard to the reporting requirements placed on the labor organization by Section 6 of the Florida Act, the majority drew a distinction between the reporting requirements themselves and the penalties applicable for their violation. As to the former, the Court found that "[t]he requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act." 325 U.S. at 543. Noting, however, that, for its failure to comply the union had been directly enjoined from functioning as a labor union, the Court held the injunction to constitute an impermissible obstacle to collective bargaining. 325 U.S. at 543. In essence, it was "the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. For all of these reasons, the state enactments, as enforced, were held to be preempted by the NLRA. 325 U.S. at 543.

Fifteen years after the decision in *Hill*, the preemptive reach of Section 7 of the NLRA was again considered by the Court in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). That case involved a challenge to Section 8 of the New York Waterfront Commission Act, which prohibited any person from collecting dues on behalf of any labor organization representing waterfront employees if any officer or agent of that organization had been convicted of a felony and had not subsequently been pardoned or received a certificate of good conduct from the board of parole. 363 U.S. at 145. This statute had been enacted in furtherance of a constitutional compact between New York and New Jersey, designed to combat crime and corruption on the States' mutual waterfront, to which Congress had granted its consent in 1953. 363 U.S. at 147-151.

Before this Court, the appellant, who had been convicted of a felony, argued that New York's threatened enforcement of Section 8 was preempted by Sections 1 and 7 of the NLRA. 363 U.S. at 145-146, 151. The theory advanced was that, under the Waterfront Commission Act, "waterfront employees do not have complete freedom of choice in the selection of their representatives, for if they choose a convicted felon the union is disabled from collecting dues." 363 U.S. at 152. This was said to create a conflict with federal law as construed in *Hill*, thus rendering the New York statute invalid. 363 U.S. at 152.

In an opinion for a four-Justice plurality, Justice Frankfurter rejected any absolutist approach to the NLRA and, in the process, reformulated the preemption test to be applied in such circumstances. In his view:

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied

> in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [363 U.S. at 153].

Declining to find in Section 7 a congressional purpose to preclude the States from regulating at all—the NLRA "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" 363 U.S. at 152—the plurality opinion then examined the compatibility of the federal-state effort, concluding:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. [363 U.S. at 152].

Applying these principles to the case at hand, Justice Frankfurter reviewed the purpose, scope and background of the New York legislation, as well as Congress' relation to it, finding the combination of factors to reflect a congressional intent to permit the operation of Section 8 of the Waterfront Commission Act. 363 U.S. 153-154. Moreover, Congress' own adoption of restrictions upon employees' freedom to choose bargaining representatives as part of the Labor-Management Reporting and Disclosure Act of 1959, §504(a), 29 U.S.C. §504 (1976), was itself viewed as evidence that Congress did not con-

sider such restrictions incompatible with its labor policies. 363 U.S. at 155-156. As to the Court's decision in *Hill*, Justice Frankfurter found it to be distinguishable in part on the ground that the state legislation there in issue—unlike that presented in *DeVeau*—was not part of a program "to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155. In a brief opinion concurring in the result, Justice Brennan expressed his view that, in part, "Congress has demonstrated its intent that §8 of the New York Waterfront Commission Act should stand despite the provisions of the National Labor Relations Act . . ." 363 U.S. at 160.

Based upon the foregoing, the Appellants submit that the congressional intent reflected in Section 7 of the NLRA does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate representatives of their own choosing. This conclusion is reinforced by the existence of Section 504 of the Labor-Management Reporting and Disclosure Act, as we will now demonstrate.

2. Section 504 of the Labor-Management Reporting and Disclosure Act, which establishes federal disqualification standards for union officials, does not preempt the states from establishing more stringent standards where justified by a compelling local interest.

The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401 et *seq.* (1976), was enacted primarily to correct the abuses which had been the subject of investigation by the Senate Committee on Improper Activities in the Labor Management Field (McClellan Committee), including the problems of racketeering, crime and corruption in the labor-management field. S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News 2318, 2424. Title V of the LMRDA imposes restrictions upon union officers, and defines disqualifications for such officers. Specifically, §504(a) of the Act, 29 U.S.C. §504(a), provides in part that

> "[n]o person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of [a series of enumerated crimes] shall serve . . . as an officer . . . of any labor organization . . . for five years after such conviction or after the end of such imprisonment . . ."

The preemptive reach of this section was definitively resolved by the Court in *DeVeau* v. *Braisted, supra.*

That case, to reiterate, involved a challenge to Section 8 of the Waterfront Commission Act, which disqualified ex-felons from holding office in waterfront labor organizations upon conviction for more and different crimes than those listed in Section 504(a) of the LMRDA, and imposed a ban which was not limited to five years as was the case under the federal enactment. In addition to preemption arguments based on the NLRA, the appellant in *DeVeau* also urged that any state disablement from holding union office which had terms at variance with Section 504(a) was impliedly barred by it. 363 U.S. at 156. Justice Frankfurter, however, found just the opposite conclusion to be indicated by the lack of an express provision within Section 504(a) preempting state action, when other sections of the LMRDA contained such provisions where Congress meant to exclude the operation of state law. 363 U.S. at 156. Justice Frankfurter's view was made conclusive by the existence of two other provisions of the LMRDA, Sections 603(a) and 604, which together were held to affirmatively preserve the operation of state laws such as Section 8 of the Waterfront Commission Act. 363 U.S. at 157. In his brief concurrence in *DeVeau,* Justice Brennan agreed that "the Labor-Management Reporting and Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." 363 U.S. at 160-161.

Based upon this analysis, three principles are clear. First, the very existence of Section 504(a) of the LMRDA constitutes persuasive evidence that Congress does not view all restrictions upon employees' freedom to choose bargaining representatives as incompatible with its labor poli-

cies as set forth in Section 7 of the NLRA. Second, the absence of an express preemption provision from Section 504(a) demonstrates that state law of a supplemental nature is not to be automatically precluded thereby. Finally, Sections 603(a) and 604 of the LMRDA affirmatively preserve the operation of certain state disqualification provisions. In articulating these principles, the Appellants do not suggest that a State may validly impose any standards it wishes on holders of union office in any industry desired. Where, however, a compelling and demonstrable need exists to go beyond the federal norm in a unique and localized industry particularly susceptible to corruption, and one heretofore criminally outlawed altogether, Congressional policy will permit the imposition of stricter standards of conduct on labor leaders engaged in such an industry. Appellants submit that New Jersey's casino gambling industry—like the waterfront industry considered in *DeVeau*—presents such an exceptional need, as explained in the sections which follow.

C. New Jersey's comprehensive regulation of casino gaming is a matter deeply rooted in its local feeling and responsibility and the prevention of corruption within that industry constitutes a compelling interest.

In our State, so extraordinarily sensitive and parochial a concern to the State and its people is gaming that such a matter is governed directly by the New Jersey Constitution itself. *N.J. Const.* (1947), Art. IV, §VII, par. 2(D) (West Supp. 1983-1984). Public approval of the amendment legalizing casino gaming followed only after assurances were given that our state would have the strongest regulation of casinos in the world; that only those individuals of the highest character, integrity and competence would be permitted to participate in casino operations; and that organized crime would be prevented from infiltrating the casino industry in any fashion 709 F.2d at 846-847 (J.S. App. 66a).

That such assurances were necessary is not surprising. Manifestly a unique industry, casino gambling has had a checkered history, particularly in Nevada, where or-

ganized crime infiltrated and dominated the industry's early development. *The Development of the Law of Gambling; 1776-1976* at 437-467 (U.S. Dept. of Justice, 1977); *Marshall* v. *Sawyer*, 301 F.2d 639, 648-654 (9th Cir. 1962) (Pope, J., concurring); *Nevada Tax Comm'n* v. *Hicks*, 73 Nev. 115, 310 P.2d 852, 854 (1957). This history confirmed the long-held view that revenues derived from gambling are the lifeblood of organized crime. See *United States* v. *Garrison*, 348 F. Supp. 1112 (E.D. La. 1972); *United States* v. *Bally Mfg. Corp.*, 345 F. Supp. 410, 419 (E.D. La. 1972). Indeed, in recent testimony before a Senate Committee, Federal Bureau of Invesigation Director William Webster informed the committee that illegal gambling still represents the greatest single revenue producer for organized crime, but that legal gaming too provides organized crime with the opportunity to "skim" the proceeds because of its nature as a cash-intensive industry. *Organized Crime in America: Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 66, 69 (1983).

Our Legislature, vitally concerned of a similar involvement here, convened numerous public hearings and interested parties were permitted to comment on the legislation proposed to implement the constitutional provision establishing casino gaming. 709 F.2d at 847 (J.S. App. 67a). Additionally, the Legislature had before it several studies pertinent to casino gaming and describing the possibilities for crime and corruption associated with the institution of legalized gaming. 536 F.Supp. at 322 (J.S. App. 84a). These hearings and studies largely confirmed that which had been generally suspected: the cash nature of the business—that is, the enormous amount of money that flows daily through a casino operation and the large number of unrecorded transactions associated therewith—make the industry an extremely attractive and vulnerable target for organized criminal elements, who may use the proceeds obtained from gambling to finance illegal activities, infiltrate legitimate business, and corrupt and subvert our democratic processes. See *Development, supra*, at 453-459; *United*

States v. *Garrison, supra,* at 1119; Organized Crime Control Act of 1970, Statement of Findings and Purpose, reprinted following 18 U.S.C. §1961 (1976); (J.S. App. 64a-66a).

Determined to prevent and eradicate the illicit conduct theretofore an all-too-often component of casino gaming, the Legislature promulgated the Casino Control Act, N.J. Stat. Ann. 5:12-1 et seq. (West Supp. 1983-1984). Reviewing the rationale for, and the goals of, this comprehensive statute, our Supreme Court, in *Knight* v. *City of Margate, supra,* stated:

> At the very heart of the public policy embraced by the new law is "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." N.J.S.A. 5:12-1 (b)(6). Related directly to this purpose, the Legislature stated that "the regulatory provisions . . . are designed to extend strict State regulation to all persons . . . practices and associations related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Id.* . . .[B]ecause casino operations "are especially sensitive and in need of public control and supervision," the statute dictates that "the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid the entry" into casino operations, directly or indirectly, of persons whose economic or occupational pursuits are violative of the "criminal or civil policies of this State." N.J.S.A. 5:12-1(b)(9). These public policy objectives were augmented by later amendments which declared that even though "[c]ontinuity and stability in casino gaming operations" were important, these could not be achieved by allowing persons with "unacceptable backgrounds and records of behavior" to control casinos. N.J.S.A. 5:12-1(b)(15); L. 1978, c. 7, §1. [86 N.J. at 380-82; 431 A.2d at 837].

It is quite evident that our casino legislation compels a strong state regulatory interest in all aspects of casino activities as well as those ancillary enterprises and per-

sons which service the casino hotels. Effective oversight and control requires encompassing in the regulatory system not only the casino operators but also the ancillary service providers and affiliated entities. Thus, it is the declared public policy of New Jersey to extend strict regulation to all persons participating in the casino industry and related activities, N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984), as well as those involved, directly or indirectly, with the licensed casino operation, N.J. Stat. Ann. §5:12-64 (West Supp. 1983-1984).

Within this class are, of course, those labor unions representing State licensed or registered casino hotel workers. By virtue of their position as collective bargaining representatives and all the federal rights which attend that status, such unions are not only "materially involved" with casino hotels in Atlantic City but are poised to exert significant control over their operations. At a minimum, casino hotel unions have the ability to obtain information on every aspect governing the employment, management and discipline of casino hotel employees;[8] to compel negotiations over all forms of remuneration, work standards, causes for discipline and discharge, grievance and binding arbitration procedures, priorities in assignment, layoff and recall of casino hotel workers and various union rights;[9] to take concerted action against the casino hotels to enforce its bargaining demands including calling a strike or setting up picket lines;[10] to compel NLRB intervention;[11] and to administer collective bargaining agreements on behalf of member employees.[12] In sum, unions such as Appellee Local 54 have the right to involve themselves directly into casino hotels in a multi-

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[8] *See, NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

[9] 29 U.S.C. §§158(a) and (d) (1976); *see e.g. National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940).

[10] See 29 U.S.C. §163 (1976); *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951).

[11] 29 U.S.C. §158 (1976).

[12] 29 U.S.C. §159 (1976).

tude of ways and the right to exert significant control over casino hotel employees. By virtue of those rights, the Appellees possess power to affect the operation of the casino hotel itself.

State supervision of labor organizations involved in gaming was also determined by the Legislature to be critical because, as the New Jersey State Commission of Investigation reported in its *Review and Recommendations by the State Commission of Investigation of the Draft Provisions Before the Assembly State Government Casino Gambling Committee* (April 1977), there were

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification according to the ownership disqualification criteria. [Id. at 2].[13]

In reaching its conclusion, the Commission of Investigation was not opining on a barren record. Twenty years before, in 1957, the United States Senate Committee on Improper Activities in the Labor-Management Field, com-

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[13] In the same vein, FBI Director Webster recently advised the Senate that organized crime's "interest in labor unions will coincide with their interest in cash-intensive organizations, or with organizations that can influence or intimidate employers that they are trying to take advantage of. Without saying that the particular unions are dominated and controlled by organized crime, we can say that we have identified organized crime contacts and influence in the International Longshoremen's Association, the International Brotherhood of Teamsters, and the Laborers International Union of North America, and the Hotel, Restaurant, and Bartenders Employees' Union." [*Organized Crime in America, supra,* at p. 70].

monly known as the McClellan Committee, discovered numerous abuses in the labor area and revealed a multitude of ways in which corrupt union officials enriched themselves at the expense of the union member. S. Rep. No. *187, supra.* In response, Congress in 1959 enacted the LMRDA. See *Fitzgerald* v. *Catherwood,* 388 F.2d 400, 403 (2d Cir.), *cert. denied,* 391 U.S. 934 (1968). Fifteen years later, Congress passed the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976), to give certain protections and guarantees to employees covered by private employee pension and welfare plans. The provisions of this complex piece of legislation improve reporting requirements as well as establish fiduciary standards for the management of these funds. Those two statutes which, *inter alia,* directly target illicit conduct on the part of labor leaders are cut from the same cloth as the 1970-enacted Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.* (1976), which outlawed the infiltration and illegal acquisition of legitimate economic enterprises, including labor unions, and the use of both legal and illegal enterprises to further criminal activity.

Given this background, and toward the singular end of bringing within the State's regulatory purview only those labor unions choosing to represent this one sensitive industry's work force, Section 93 of the Casino Control Act was enacted, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984). In a somewhat similar manner to the licensing of those companies supplying the casino hotels on a regular basis with goods and services, the New Jersey Legislature established a registration system[14] for those unions representing casino hotel employees and certified as their sole and exclusive bargaining agent when deal-

[14] A labor union "registrant" is not required to affirmatively demonstrate the suitability of its credentials as is otherwise generally demanded of "licensees". Furthermore, the Appellant Division bears the burden of proving that the registrant is disqualified; a licensee, on the other hand, generally bears the burden of affirmatively proving that it is qualified.

ing with management. This process of registration was designed, not to regulate or oversee the precise bargaining relations and relationships between and among casino hotel employees, their union and their employers, but rather to regulate that conduct on the part of a union's leaders and agents which is contrary to the policies enumerated in the preamble to the Casino Control Act, N.J. Stat. Ann. §5:12-1 (West Supp. 1983-1984). The registration and qualification requirements were intended to close an historically-documented avenue of organized criminal access into casino hotels and to exclude members of organized crime and others whose conduct was unsavory from affecting, through labor unions, the State's casino industry, thereby defusing this potentially explosive combination.

D. The requirements imposed by Section 93 of the Casino Control Act, and the sanctions permitted for violation thereof, are not incompatible with federal labor policy.

Having established that Congress did not intend to preempt all state regulations of the type at issue here, embedded as they are in deeply rooted local interests, we now examine the compatibility *vel non* of the dual statutory schemes, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* 414 U.S. at 127, and whether Section 93 of New Jersey's Casino Control Act frustrates the achievement of congressional objectives, *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. We reiterate that the *purpose* for which New Jersey enacted Section 93 is not preempted, since this provision is part and parcel of a much broader scheme to govern its casino gaming industry, a matter uniquely and plenarily reposed in the State. As to the actual *operation* of the concurrent exercises of power, perhaps the clearest indication that compliance with both federal and New Jersey law is possible in the present case is the NLRB's express finding that its own assertion of jurisdiction can successfully co-exist with the enforcement of local laws in extensively state-regulated industries, most notably legalized gambling. See *El Dorado, Inc.,* 151 NLRB 579 (1965); *Volusia Jai Alai, Inc.,* 221 NLRB 1280 (1975).

1. The requirement of registration by a labor organization does not create a conflict with federal law.

Section 93(a) of the Casino Control Act requires that each labor organization seeking to represent state-licensed employees of a casino hotel must register with the Commission annually, and must disclose the names of its officers and agents, and those of all affiliated organizations, pension and welfare systems. In *Hill* v. *Florida, supra,* this Court considered a challenge to a Florida statute requiring every labor organization operating in the State to file an annual report with the Secretary of State giving the name of the organization, the location of its offices, and the names and addresses of its officers; a filing fee of $1.00 was also required. 325 U.S. at 540, 557. Another section of the statute made it a misdemeanor for any person or labor organization to violate its provisions, and a union failing to report and pay the filing fee was subject to an injunction prohibiting it from functioning and operating until it had complied. 325 U.S. at 540-541, 557.

In this situation, the enforcement of the Florida legislation was held to be preempted by the NLRA. 325 U.S. at 543. Nevertheless, the Court was careful to point out that "the requirement as to the filing of information . . . does not, in and of itself, conflict with the Federal Act," and that "[i]t is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. In effect, a distinction was drawn between the filing requirements themselves, which were not precluded by federal law, and the sanctions applied for a failure to file, which were barred because, as an injunction against the very operation of the labor union, they constituted a "direct impediment to the free exercise of the federally established right to collective bargaining". 325 U.S. at 543.

The Court's decision in *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 (1945), stands as a

relevant counterpoint to *Hill* in this context. In *McAdory*, the petitioners sought a declaratory judgment that federal labor law preempted an Alabama statute which comprehensively regulated labor unions. Section 7 of the enactment mandated that unions annually file various reports with a state Department of Labor, and further rendered it unlawful for any officer or agent of a union to receive dues from any member while his organization was in default with respect to filing such reports. From an adverse decision, the petitioners sought review in this Court. 325 U.S. at 453-456. In dismissing the previously-granted writ of certiorari, the Court rejected the specific claim that Section 7 of the Act was in conflict with the NLRA:

> [W]e cannot asume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file. We therefore have no question before us of a statute which has been construed to operate either by its penal sanctions or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for non-compliance with §7. Compare *Hill* v. *Florida* . . . Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that act is applicable. [325 U.S. at 466].

Reading *Hill* and *McAdory* together, it is clear that a state-imposed requirement that certain information be filed by a labor organization is not, in itself, preempted by the NLRA. *Hill, supra,* 325 U.S. at 543; *McAdory, supra,* 325 U.S. at 466. It is also evident that a sanction for failure to file which directly prohibits a union from engaging in collective bargaining will be precluded by the operation of federal law, *Hill, supra,* 325 U.S. at 543, but that a penalty such as a ban on dues collection will not be so excluded, *McAdory, supra,* 325 U.S. at 466. These twin principles should dictate the result on the facts of the present case.

Here, Local 54 did in fact register with the Commission as required by Section 93(a) of the Casino Control Act (J.S. App. 7a), an obligation which in no manner interfered with the performance of the union's functions under the NLRA, and the union was therefore never threatened with any penalty for noncompliance. Moreover, Section 93 on its face does not make registration a pre-condition to the initiation or continuation of collective bargaining by a labor organization; the statute merely imposes a registration obligation on those unions participating in the casino gaming area. Even assuming the sanctions specified in Section 93(b) of the Act (J.S. App. 247a) are available to enforce the statute's registration requirements, the prohibition on the collection of dues is the same remedy held not to be precluded in *McAdory, supra,* 325 U.S. at 366, and the remaining sanction—the prohibition on the administration of pension or welfare funds—should be sustainable by parity of reasoning as well.[15].

2. The application to officials of labor organizations participating in the casino gaming industry of disqualification standards more stringent than those generally applicable under federal law is not preempted by any federal statute or policy.

In the previous section, the Appellants demonstrated that the requirement of registration imposed upon labor organizations by Section 93(a) of the Casino Control Act does not create a conflict with federal law; no balancing of interests was required because the mere filing of information returns does not in itself interfere with a union's functioning under the NLRA. The disqualification standards for union officials embodied in Sec-

[15] Whether other penalties for failure to register exist within the Casino Control Act is an open question under state law, but the speculative possibility that some sanction will in the future be applied to Local 54 in such a manner as to conflict with federal labor law does not present a proper controversy to this Court, *McAdory, supra,* and certainly does not render invalid the existing registration requirements of Section 93(a) of the Act.

tions 86 and 93(b) of the Act stand on a different footing, since these provisions do impose restrictions on who may be chosen for union office beyond those generally applicable under federal law. Under these circumstances, and in light of New Jersey's deeply rooted and compelling interest, the Court must balance the importance of that interest against the degree to which state law substantively conflicts with federal law or interferes with the jurisdiction of the NLRB. *Belknap, Inc.* v. *Hale, supra,* 103 S.Ct. at 3177; *Local 926, Int'l Union of Oper. Eng.* v. *Jones, supra,* 103 S.Ct. at 1459; *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 190-208.

As regards the conflict between state and federal law, it is true that in *Hill* v. *Florida, supra,* the Court held a State preempted by Section 7 of the NLRA from enforcing a law which purported to establish broad qualification standards for union officials. It is also true, though, that subsequent to *Hill* both Congress and this Court have clearly demonstrated that the freedom of a group of employees to designate "representatives of their own choosing" is necessarily and obviously less than complete.

Congress has acted by acquiescing in the state-imposed restrictions as part of the bi-state compact considered in *DeVeau* v. *Braisted, supra,* and has further acted by adopting for itself criteria disqualifying certain persons from holding union office as part of the LMRDA. It was thus for good reason that Justice Frankfurter could announce in *DeVeau* that "the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" and that the preemption issue generated by such a state policy was not "a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers." 363 U.S. at 152. At bottom, the question presented by this case is the same question formu-

lated in *DeVeau*: "Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?" 363 U.S. at 153. The Appellants respectfully submit that Congress would not find in Section 93 of the Casino Control Act a substantial frustration of its labor policy, based upon the following considerations.

First, Section 93 is not the type of broad licensing system condemned in *Hill*, which was applicable to all unions operating within the jurisdiction, which established broad qualification standards including "good moral character" for officials of such unions, and which does not appear to have been adopted in response to any specific danger or for any particular reason other than to exercise some control over collective bargaining functions. See 325 U.S. at 540-542. In sharp contrast, Section 93 of the Act contains narrowly-defined standards of disqualification based exclusively on criminal or *quasi*-criminal conduct rather than "character," and like the legislation upheld in *DeVeau*, is part of a comprehensive program "to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155.

In its attempt to distinguish *DeVeau* from this matter, the Court of Appeals majority relied on the fact that the Waterfront Commission Act was adopted pursuant to a *congressionally approved* bi-state compact, thus suggesting that Congress considered its implementation as a singular exception to federal labor policy. 709 F. 2d at 829 (J.S. App. 28a-29a). But this argument proves too much in light of the fact that when Congress ratified the Compact, which by its own terms reaffirmed the employee rights of association, self-organization and designation of representatives of their own

choosing,[16] see 363 U.S. at 163-164, that body was also fully conscious of the state-imposed restrictions on those rights embodied in Section 8 of the New York Act, 363 U.S. at 151. The more sound inference to be drawn from congressional tolerance in *DeVeau*, then, is that Congress viewed the Section 8 limitations as fully compatible with rights guaranteed by Section 7 of the NLRA and its own acquiescence therein as consistent with, rather than a modification of, well-established federal labor policy. Moreover, as pointed out by Judge Becker in his dissenting opinion in the Third Circuit:

> The Waterfront Commission Compact was presented to and considered by Congress not because its authors and sponsors believed it to embody a scheme that contravened the NLRA but because the Compact contemplated the establishment of a bi-state commission to combat evils that could not be eradicated by the two states acting individually. See H.R. Rep. No. 998, 83d Cong., 1 Sess. 3 (1953). In other words, it was the bi-state nature of the compact, and not any potential intrusion on national labor policy, that demanded congressional attention. [709 F. 2d at 845 (J.S. App. 62a-63a)].

The totality of these factors demonstrates conclusively that while the approval of the waterfront compact following congressional hearings facilitated ascertainment of congressional intent in *DeVeau*, Justice Frankfurter's pre-

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[16] Indeed, Art. XV, §1, of the Compact itself stated:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own chooisng. [363 U.S. at 163-164].

Clearly, if Section 7 of the NLRA had been an absolute as contended for by the appellant in *DeVeau*—and as absolute as the Court of Appeals majority found it to be in this case—the *DeVeau* Court simply could not have upheld Section 8 of the Waterfront Commission Act in light of Article XV of the Compact, which was precisely the point made by the dissenting opinion. See 363 U.S. at 163-164.

emption analysis was not based upon the existence of those hearings or the compact alone, but instead is broad enough to permit the operation of state laws—such as Section 93—designed to meet a compelling need which a State is obliged by circumstances to meet on an individual basis.

As a second consideration, it was unequivocally held in *DeVeau* that Section 504(a) of the LMRDA, which establishes federal disqualification standards for union office, does not preempt a State from adopting more stringent standards as an exercise of its own police powers. 363 U.S. at 156, 160-161. Moreover, Sections 603(a) and 604 of the LMRDA were also held to affirmatively preserve the operation of such state laws, and none of the Court's holdings with regard to the LMRDA in any way turned on the presence or absence of a congressionally approved compact. See 363 U.S. at 156-157. That being the case, and in view of the familiar canon of statutory construction that the specific governs the general, if New Jersey is not preempted from enacting and enforcing Section 93 of the Casino Control Act by the specific terms of Section 504(a) of the LMRDA, it should not be so preempted by the more general provisions of Section 7 of the NLRA.

This conclusion is reinforced by the fact that, as observed in *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1123 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other grounds*, 642 F. 2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981): "The LMRDA was adopted in large part because state and local authorities had failed to adopt 'effective measures to stamp out crime and corruption' [in unions] . . ." In light of this background, it would be ironic if the LMRDA itself, or any other provision of federal labor law, were held to now *preclude* state and local authorities from adopting measures to stamp out crime and corruption in unions which complement those existing by federal regulation.

As a final matter, the operation of Section 93 would not seem unduly to impair any concept of national uniformity in federal labor law. As noted earlier, the Appellants do not contend that New Jersey's disqualification stand-

ards for officials of casino labor organizations should be available to any State and applicable to any industry. Rather, it is our position that, consistent with the disqualification criteria of the LMRDA, in certain rare situations—casino gambling being one—stricter standards are permissible and do not frustrate national labor policy. 709 F. 2d at 849-851 (J.S. App. 72a-77a). As this Court itself has recognized, albeit in a Fourth Amendment context, pervasively regulated and inherently dangerous industries may for some purposes be treated as a subject apart. See *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms industry); *Colonnade Catering Corp.* v. *United States*, 379 U.S. 72 (1970) (liquor industry).

The Court should also note that application of more stringent disqualification standards to officials of waterfront labor unions has not adversely affected the nationwide application of federal labor law. Thus, there is no reason to belive that extension of the same principles to only those labor organizations choosing to associate themselves with the New Jersey casino gaming industry will do so either. As noted in Point C *supra*, legalized casino gambling represents a unique industry in this country, because of its history of organized crime involvement, its heavy and unrecorded cash flow, and its intensive dependence on employee services, all of which render the industry particularly vulnerable to corruption via labor racketeering. In view of Congress' own recognition that certain aspects of gambling required its specific attention and regulation, *see, e.g.*, 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); *id.* §1084 (1976) (barring transmission of wagering information by wire); *id.* §§1301-1304, 1307 (1976 & Supp. V 1981) (regulating lotteries); *id.* §1953 (1976 & Supp. V 1981) (barring interstate transportation of gambling paraphernalia), it is submitted by the Appellants that Congress would not find in Section 93 a frustration of its labor policy, nor would a holding to that effect by the Court open the floodgates to a host of similar provisions in other States and in other industries.

Turning to the question whether the enforcement of Section 93 of the Casino Control Act interferes with the jurisdiction of the NLRB, the Appellants note that since its decision in *El Dorado, Inc.*, 151 NLRB 579 (1965), the NLRB has consistently asserted its jurisdiction over labor-management relations in the casino gaming industry. *El Dorado* itself was based upon the Board's view that its supervision of labor-management relations in that industry, and Nevada's strict and admittedly valid regulations aimed in part at preventing organized crime from infiltrating gaming, were compatible with one another. 151 NLRB at 580. More recently, in *Volusia Jai Alai, Inc.*, 221 NLRB 1280 (1975), the Board reached a similar conclusion with regard to Florida's jai alai industry. In deciding to exercise jurisdiction over the relationships between the players and fronton management, the Board found that, as with the casino industry, state regulation could successfully coexist with the Board's assertion of jurisdiction, in view of the totally different aims of the state and federal controls. 221 NLRB at 1281-1282.

With specific regard to Section 93 of the Casino Control Act, that provision in no manner seeks or purports to regulate collective bargaining between casino employers and employees, or the terms and conditions of any agreements entered into between these parties, which concededly fall within the jurisdiction of the Board. What Section 93 does seek to accomplish, the removal of disqualified labor union officials, involves an area extraneous to the regulatory concerns of the Board, given its conclusion that consistent with the purposes of the NLRA, it must recognize any "labor organization" as defined therein without regard to the criminality or corruption of that organization's officers. See *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962). For both these reasons, the operation of Section 93 will not impermissibly intrude upon the jurisdiction of the Board, as may be gathered from the fact that the NLRB exercises jurisdiction over the New York waterfront despite the operation of the disqualification provisions of the Waterfront Act upheld in *DeVeau, supra*. See 709 F.2d at 851 n.26 (J.S. App. 75a-76a).

In sum, then, Appellants submit that in light of the absence of explicit direction from Congress, the minimal restriction imposed by Section 93 of the Casino Control Act on employees' freedom to choose bargaining representatives is more than justified by the State's compelling interest in minimizing corruption in its unique and localized casino gaming industry, and by the state act's complete non-interference with the jurisdiction or functioning of the Board. Under these circumstances, the application of Section 93's standards of conduct to officials of labor organizations engaged in casino gaming should be held by the Court not to be preempted by any federal statute or policy. Notwithstanding this conclusion, the specific sanctions adopted by Section 93 to enforce its disqualification standards must still be independently permissible under federal law. The Appellants assert that these penalties are indeed permissible, for the reasons which follow.

3. The prohibition on the receipt of dues authorized by Section 93, and imposed in this case, is not preempted by federal policy.

As noted above, Section 93(b) of the Casino Control Act provides that a labor organization which neglects or refuses to remove a disqualified officer may be prohibited from receiving any dues from any employee licensed under the act and employed by a casino hotel (J.S. App. 247a). An order containing such a prohibition was entered by the Casino Control Commission in the present case (J.S. App. 206a-207a). It is submitted by the Appellants that the dues ban sanction is clearly not preempted by federal labor law, the touchstone for analysis being *DeVeau* v. *Braisted, supra.*

In *DeVeau,* the Court had before it a section of the Waterfront Commission Act which was almost identical in concept and operation with Section 93(b) of the Casino Control Act. The appellant, who had been convicted of a felony, was dismissed from his position as a union official when the District Attorney threatened to prosecute any-

one collecting dues on behalf of the union while the appellant remained in office. 363 U.S. at 145-146. In upholding the validity of Section 8 of the Waterfront Act against a challenge that it was preempted by federal labor law, the plurality opinion of Justice Frankfurter necessarily found that the dues-collection proscription was a permissible method of enforcing New York's union officer disqualification provision. See 363 U.S. at 152-157. *Accord, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 642 F. 2d 666, 669-670 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981). This approach represented no abrupt break with precedent, for as discussed in Point D (1) *supra*, the Court in *Alabama State Federation of Labor* v. *McAdory* had unanimously concluded that a state statute which made it unlawful for a labor organization to collect dues from any member while it was in default with respect to filing certain information did not conflict with the NLRA. 325 U.S. at 456, 466. *McAdory*, of course, was decided contemporaneously with, and by the same Court as, *Hill* v. *Florida*.

Reading *Hill*, *McAdory* and *DeVeau* together, it is clear that this Court has consistently and conclusively ruled that a prohibition on the receipt of dues by a union—to enforce an obligation which a State has the right to impose—does not interfere with the performance of a union's functions so as to be preempted by federal labor law. Nor is this conclusion in any way undercut by the fact that other, more direct, methods may be available to achieve the State's goal. As observed by the Second Circuit in an analogous context in *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, *supra*:

> The district court's assumption that the availability of "less drastic" measures would make it unnecessary in most cases to resort to the dues-collection prohibition, does not, however, make the prohibition unconstitutional. Although the alternative measures constitute more direct methods of achieving New York's goal of banning persons convicted of certain crimes from office in waterfront unions, it does not follow that the indirect method, the dues-

> collection provision, is either unnecessary or too drastic, given the possibility of recalcitrant union officials. If such officials, intent on retaining convicted men in office, had the support of a determined union membership, the threatened use of the dues-collection prohibition might be a more prompt and effective remedy than criminal prosecution of the union or its officers. [642 F. 2d at 671].

Based upon all the foregoing considerations, the prohibition on the receipt of dues permitted by Section 93(b) of the Casino Control Act and imposed by the Commission in this case is not preempted by federal labor law or policy.

4. The ban on the administration of pension or welfare funds permitted by Section 93 is not preempted by the Employee Retirement Income Security Act.

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976), is a comprehensive statute subjecting to federal regulation plans providing employees with fringe benefits and is designed to promote the interests of employees and their respective beneficiaries in such plans. *Shaw* v. *Delta Airlines, Inc.*, 103 S.Ct. 2890, 2896 (1983). As a by-product of its plan to protect workers' benefit programs, Congress undertook to establish benefit plan regulation as essentially an exclusive federal concern, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

To assure and achieve the realization of workers' expectations, ERISA establishes uniform standards for both pension and welfare plans, including rules governing reporting, disclosure and fiduciary responsibility. *Shaw, supra,* 103 S.Ct. at 2896-2897. Additionally, and of critical import in the circumstances of the instant case, ERISA, by virtue of criteria enumerated in Section 411 thereof, 29 U.S.C. §1111 (1976) (J.S. App. 238a-240a), prohibits persons convicted of certain conduct from holding, for a period of years, any position with an employee benefit plan.

In much the same fashion that ERISA prohibits certain persons from holding positions of responsibility and

trust with benefit plans, Section 93(b) of the Casino Control Act may operate to prevent a casino union from administering its own pension or welfare fund, if that union maintains in office persons who are disqualified pursuant to applicable statutory criteria.[17] Although the State's disqualification standards are admittedly more stringent than those imposed by ERISA, the state regulation should be sustainable using the same analysis which supports the state action in the NLRA/LMRDA context. The only complicating factor is that, unlike the LMRDA, Section 514(a) of ERISA contains an express provision which supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. §1144 (1976) (J.S. App. 241a). The Appellants contend that Section 93(b) of the Casino Control Act does not "relate to" employee benefit plans within the preemptive contemplation of ERISA, based upon the following considerations.

First, one clear purpose of the ERISA preemption provision was to facilitate the administration of benefit plans covering employees in several different States. *Shaw, supra,* 103 S.Ct. at 2904; this purpose will not be undercut by a regulation the scope of which is, by definition, limited to one particular industry in one particular State. Second, the ERISA preemption clause is also designed to prevent state interference with the results of collective bargaining between labor and management, as expressed in the terms of a benefit plan itself, *Alessi, supra,* 451 U.S. at 525-526. But Section 93(b) in no manner affects the terms of a pension or welfare fund; it only prohibits a union from administering benefit plans if it retains in office a disqualified union official—a specific law enforcement objective wholly disparate from the general aims of ERISA. Third, the precise contours of ERISA's

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[17] In this connection, it should be noted that the Casino Control Commission declined to impose the pension or welfare fund administration ban on Local 54 in this case, see J.S. App. 208a-215a, thus the Court is presented with no application of this particular sanction on the facts herein.

preemptive effect are unclear because, as acknowledged by Justice Marshall, the term "relate to", the very criterion utilized by Congress to describe those state laws subject to preemption, "gives rise to some confusion." *Alessi, supra,* 451 U.S. at 523. Indeed, as this Court itself has recognized, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw, supra,* 103 S.Ct. at 2901 n. 21. For the same reasons noted above, to the extent that Section 93 affects benefit plans, it does so in a highly indirect manner, and one which is entirely avoidable by the action of the affected union itself.

As a final matter, Section 514(d) of ERISA, 29 U.S.C. §1144(d) (1976) (J.S. App. 245a), contains a saving clause which provides in part that nothing within ERISA should be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," thus Section 603(a) of the LMRDA is not precluded by ERISA. Section 603(a) of the LMRDA—as construed in *DeVeau* v. *Braisted*—permits New Jersey to impose its own disqualification standards on officials of labor organizations engaged in the casino gaming industry. Simply put, therefore, if the State may lawfully prohibit some persons from serving as casino union officials even though federal law would allow them to serve, it follows that the State should be permitted to enforce its prohibition even if such enforcement entails some minimal difference with the terms of ERISA.

An approach similar to that advocated herein was adopted in *Local 1804, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n,* 85 N.J. 606, 428 A. 2d 1283 (1981). In that case the court considered whether Section 8 of the Waterfront Commission Act, which mandated removal of disqualified union officials upon conviction in the trial court, was preempted by a contrary provision contained in Section 411(c) of ERISA, 29 U.S.C. §1111(c) (J.S. App. 240a), which deems a union official "convicted" only after all appeals had been exhausted. 85 N.J. at 608-

610, 615; 428 A. 2d at 1284-1285, 1288. Refusing to find the state enactment automatically barred by ERISA, the court instead balanced the degree of intrusion on federal policies and the relative importance of the federal and state interests at stake. 85 N.J. at 615, 428 A. 2d at 1288. Applying the preemption analysis set forth by this Court in *DeVeau* v. *Braisted*, the court concluded:

> Congress . . . did not intend to secure benefits for all employees by exposing workers on the waterfront to crime and corruption. Both section 8 of the compact and section 411(c) of ERISA require removal of union officers for this misconduct. Although the statutes have different purposes, they both protect employees, their unions and the public. The provision of section 8 that a conviction is effective on entry by a trial court differs minimally from the provision of ERISA that a conviction is effective only after exhaustion of all appeals. Thus viewed, section 8 does not impinge upon section 411(c) of ERISA in any significant sense. [85 N.J. at 616; 428 A. 2d at 1288-1289].

Accord, Int'l Longshoremen's Ass'n v. *Waterfront Comm'n, supra*, 495 F. Supp. at 1124-1125.

In a similar manner, although New Jersey's disqualification standards for casino union officials—which can be derivatively applied to prevent a union itself from administering a pension or welfare plan—are stricter than those contained in Section 411 of ERISA, the difference is amply justified by the State's compelling interest in removing unsuitable labor officials from positions in which they can act to corrupt the gaming industry. Following the reasoning employed in *DeVeau*, as well as the *Longshoremen* cases set forth above, the Appellants submit that the ban on the administration of pension or welfare funds permitted by Section 93(b) of the Casino Control Act is not preempted by ERISA.

CONCLUSION

For all of the reasons set forth herein, the judgment of the Court of Appeals, holding Section 93 of the New Jersey Casino Control Act preempted by federal labor law, should be reversed.

Respectfully submitted,

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NO. 83-573

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN, DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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Questions Presented

1. Should the federal courts abstain from exercising jurisdiction over a suit seeking to enjoin an ongoing state administrative proceeding, where the state proceeding was brought by the New Jersey Attorney General in furtherance of New Jersey's vital interest in maintaining the integrity of its casino industry?

2. Does the National Labor Relations Act preempt section 93 of the New Jersey Casino Control Act which, as part of a pervasive and intensive system of casino industry regulation, excludes persons from serving in positions of authority in casino industry labor unions where those persons have been convicted of certain crimes or have been found to conduct union affairs under the influence of organized crime?[1]

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[1] The following are the parties to the United States Court of Appeals proceeding from which this appeal is taken: Hotel and Restaurant Employees and Bartenders International Union Local 54; Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54; New Jersey Casino Control Commission; Martin Danziger, Acting Chairman; Don Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner; State of New Jersey Department of Law and Public Safety, Division of Gaming Enforcement; G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement; Thomas Kean, Governor, State of New Jersey. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Section 331, were permitted to intervene in the District Court, but did not participate in the proceedings before the Circuit Court.

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Appendix

The following items are contained in appellants' appendix to their jurisdictional statements:

A—Opinion of United States Court of Appeals for the Third Circuit 1a

B—Opinion of United States District Court for the District of New Jersey 78a

C—Order of United States District Court for the District of New Jersey 129a

D—Opinion of New Jersey Casino Control Commission 131a

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J—The National Labor Relations Act, §7, 29 U.S.C. §157 (1976) 235a

K—The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976) 236a

L—The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976) 238a

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M—The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), as amended by Act of Jan. 14, 1983, Pub. L. No. 97-473, §301(a), §302(b), 96 Stat. 2611, 2613 (1983) 241a

N—N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) 246a

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The following items are contained in the parties' joint appendix to the briefs on the merits:

A—Chronological List of Relevant Docket Entries 1a

B—Verified Complaint 4a

C—Amended Complaint 20a

D—Answer on Behalf of Defendants Martin Danziger, *et al.* 38a

E—Answer on Behalf of Defendants G. Michael Brown, *et al.* 41a

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NO. 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY;

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54; and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR APPELLANTS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3 Cir. 1983) and is reproduced at A1a-A77a.[2] The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) and is reproduced at A78a-A128a. The opinion and supplemental opinion of the New Jersey Casino Control Commission are unreported and are reproduced at A131a-A205a and A208a-A215a.

Jurisdiction

These proceedings involve a claim that section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), is invalid under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI cl. 2, because it is preempted by federal labor legislation. The District Court found that federal jurisdiction was properly invoked under 28 U.S.C. §1331 (West Supp. 1983) and 28 U.S.C. §1337 (West Supp. 1983) (A90a).

Plaintiffs, a labor union and its president, moved in the District Court for a preliminary injunction against enforcement of section 93 (JA49a-JA54a). Defendants, the New Jersey officials charged with implementation of the Casino Control Act, moved to dismiss the complaint on the ground of abstention (JA55a-JA56a). The District Court denied both motions. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1) (West Supp. 1983), and defendants cross-appealed.

On June 6, 1983, by a two to one vote, the Court of Appeals declared section 93 invalid (A31a; A33a) and entered judgment reversing the denial of the preliminary injunction, remanding for further proceedings, and dismissing the cross-appeals for lack of jurisdiction (A217a-A219a). Although the Court dismissed the cross-appeals,

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[2] The appendix to appellants' jurisdictional statements is referred to as "A-a." The joint appendix to the parties' briefs on the merits is referred to as "JA-a."

it considered the issue raised on the cross-appeals, abstention, as a possible ground for upholding the District Court's denial of the preliminary injunction, and determined the issue on its merits against defendants (A13a).

The Honorable Edward Becker, Circuit Judge, dissented, contending that section 93 is not preempted. Judge Becker also contended that the Court had jurisdiction over the cross-appeals, stating: "Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstention is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief" (A40a, n.2). *See also*, 9 *Moore's Federal Practice*, §110.25 at 271, 273 (2 ed. 1970); *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287 (1940); *Kershner* v. *Mazurkiewicz*, 670 F.2d 440 (3 Cir. 1982) (*in banc*); *Genosick* v. *Richmond United School District*, 479 F.2d 482, 483 (9 Cir. 1973); *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F.2d 1197, 1201 (2 Cir. 1970); *Hurwitz*, v. *Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2 Cir. 1966), *cert.* den., 385 U.S. 971 (1966). However, Judge Becker agreed with the majority that the District Court did not err in declining to abstain.

Defendants petitioned for rehearing *in banc* on June 20, 1983. The petition was denied by an evenly divided Court on June 30, 1983. Defendants filed notices of appeal to this Court on July 18 and August 3, 1983 (A224a-A234a). Plaintiffs filed a motion to affirm. On November 28, 1983, this Court noted probable jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2) (1966). Although the Court of Appeals remanded for further proceedings, presumably the issuance of a permanent injunction, it is clear that the unconstitutionality of section 93 has been definitely and finally adjudicated, that New Jersey has been enjoined from enforcing the statute, and thus that the present appeal lies under §1254(2). *City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976). The statute having been declared unconstitutional, the entry of the permanent injunction by the District Court would be a mere formality.

There are claims in plaintiffs' complaint which have not been adjudicated. First, there is a claim that section

93 is violative of the First Amendment, which the Court of Appeals declined to address because it had found the statute unconstitutional on preemption grounds (A37a). There is also a claim for money damages, as to which there is a motion to dismiss on the ground of sovereign immunity pending in the District Court. However, it is clear that the First Amendment question is now moot and that the damage claim has no bearing on the constitutionality of section 93. Thus, as the Court said in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302, "the policy underlying §1254(2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented."

It is therefore respectfully submitted that the preemption issue, and the abstention issue which is inextricably bound therewith, are properly before this Court.

Constitutional Provision and Statutes Involved

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (1973), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement re-

> quiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), provides, in pertinent part:

> a. Each labor organization, group or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The full text of section 93 is reproduced at A246a-A247a. Other relevant statutes are reproduced at A235a-A255a and JA59a-JA64a.

Statement of the Case

In November 1976 the voters of New Jersey approved an amendment to the state Constitution permitting the Legislature to authorize casino gambling within the municipality of Atlantic City, so long as all state revenues derived therefrom were dedicated to reducing property taxes and utility bills of senior citizens and disabled residents. N.J. Stat. Ann., Const. (1947), Art. IV, §7, par. 2D (West Supp. 1983).[3] In June 1977 the state Legisla-

[3] A subsequent amendment, in 1981, permitted revenues to also be used for health and transportation benefits for senior citizens and disabled residents.

ture adopted the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-1 *et seq.* (West Supp. 1983) (the Act), which authorized casino gaming in Atlantic City and put in place an extraordinarily pervasive and intensive system of regulation of the nascent casino industry.

The Act declares that it is the public policy of New Jersey to extend strict regulation to all persons participating in the casino industry and related activities, N.J. Stat. Ann. 5:12-1(b)(6) (West Supp. 1983), and that it is in the vital interest of New Jersey to prevent any direct or indirect participation of unsuitable persons in casino and ancillary operations. N.J. Stat. Ann. 5:12-1(b)(9) (West Supp. 1983).

In order to implement these legislative goals, the Act imposes strict licensure and qualification requirements on companies which own or operate casino hotels, N.J. Stat. Ann. 5:12-82(b) (West Supp. 1983); officers, directors, security holders, principal employees, etc. of such companies, N.J. Stat. Ann. 5:12-85(c) and (d) (West Supp. 1983); investors and financial backers of such companies, N.J. Stat. Ann. 5:12-84(b) (West Supp. 1983); persons involved in the operation of casinos, N.J. Stat. Ann. 5:12-9 and 89 (West Supp. 1983); other persons employed in casino hotels who have access to the casino, N.J. Stat. Ann. 5:12-7 and 90 (West Supp. 1983); and companies and individuals which provide goods and services to casino hotels, N.J. Stat. Ann. 5:12-12 and 92 (West Supp. 1983). In addition, the Act provides a system of registration for all persons who work in casino hotels without having access to the casino. N.J. Stat. Ann. 5:12-8 and 91 (West Supp. 1983). The Act also requires appellant New Jersey Casino Control Commission (the Commission) to review all contracts entered into by casino hotels, on the basis of, *inter alia,* the qualification of the persons involved, and to terminate any such contracts which it disapproves. N.J. Stat. Ann. 5:12-104(b) (West Supp. 1983). Furthermore, the Act requires the Commission to assure that no unqualified, disqualified or unsuitable persons have any material involvement, direct or indirect, with casino

hotel operations. N.J. Stat. Ann. 5:12-64 (West Supp. 1983).

All of the licensure, qualification, registration and other regulatory provisions described above[4] encompass a series of disqualification criteria set forth in section 86 of the Act, N.J. Stat. Ann. 5:12-86 (West Supp. 1983). Among these disqualification criteria are the commission of certain designated crimes, N.J. Stat. Ann. 5:12-86(c) (West Supp. 1983), and identification as a "career offender" or member of a "career offender cartel," or as an associate of a career offender or member of a career offender cartel, if the association is found to be "inimical to the policy of this act and to gaming operations." N.J. Stat. Ann. 5:12-86(f) (West Supp. 1983). In most instances, the regulatory requirements described above also entail an affirmative burden of satisfying certain suitability criteria, principally good character, honesty and integrity, set forth in N.J. Stat. Ann. 5:12-89 (West Supp. 1983). *See,* N.J. Stat. Ann. 5:12-104(b), -92(b), -92(d), -90(b), -85(c), -84(b) and -64 (West Supp. 1983).

The Act, in section 93, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), also requires labor organizations which represent or seek to represent persons employed in casinos or casino hotels to register annually with the Commission. N.J. Stat. Ann. 5:12-93(a) (West Supp. 1983). Section 93 further provides that no labor organization which is registered or required to register may receive dues from any casino industry workers, or administer pension or welfare funds, if any "officer, agent or principal employee" of such labor organization is found to be disqualified under section 86, unless the Commission waives the disqualification consistent with the public policy of the Act and in the interests of justice. N.J. Stat. Ann. 5:12-93(b) (West Supp. 1983). Section 93 does not impose any affirmative suitability criteria.

The Act creates two state agencies, both appellants herein: the Commission, which has general responsibility for

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[4] The listing provided is by no means complete, but is merely illustrative.

implementing the Act and has adjudicatory and regulatory powers, *see*, N.J. Stat. Ann. 5:12-63 *et seq.* (West Supp. 1983); and the Division of Gaming Enforcement (the Division), within the Office of the Attorney General, which has investigatory and prosecutorial functions. *See*, N.J. Stat. Ann. 5:12-76 *et seq.* (West Supp. 1983).

Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) is the largest union operating in the New Jersey casino industry, and has registered under section 93 of the Act. Appellee Frank Gerace is the president of Local 54.

Following Local 54's registration, the Division conducted an investigation and, on May 11, 1981, filed a report with the Commission in which it alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its executive board, Frank Materio, were disqualified under section 86(e) by reason of criminal convictions, and that Lumio, Materio and union president Gerace were disqualified under section 86(f) by reason of organized crime associations.

The Commission scheduled a hearing on the allegations in the Division's report to commence on September 9, 1981. At a prehearing conference, Local 54 alleged that sections 86 and 93 were unconstitutional. The Commission ruled that as an administrative agency it was without authority to entertain facial challenges to the constitutionality of provisions of its enabling statute. Thereafter, on August 17, 1981, Local 54 and Gerace filed suit against the Commission, the Division and the State in the Federal District Court for the District of New Jersey, seeking a declaratory judgment that sections 86 and 93 are unconstitutional, temporary and permanent injunctive relief, and money damages. At the request of the District Court, the Commission agreed to postpone the scheduled hearing until the Court ruled on the motion for a preliminary injunction.

On March 22, 1982, the District Court denied Local 54's motion for a preliminary injunction, and also denied the motion of the Commission and Division, grounded in the principles of abstention, to dismiss the complaint (A78a-A128a).

Local 54 and Gerace appealed the District Court's order denying the preliminary injunction to the United States Court of Appeals for the Third Circuit, and the Commission and Division cross-appealed, alleging that the Court erred in refusing to abstain from exercising jurisdiction. Both the District Court and the Court of Appeals denied motions brought by Local 54 and Gerace seeking a temporary injunction pending appeal. The Commission therefore rescheduled the hearing on the allegations in the Division's report.

Before the hearing commenced, the Division filed a second report, in which it alleged that two Local 54 business agents, Eli Kirkland and Karlos LaSane, were disqualified under section 86(c) because of criminal convictions. The hearing, which encompassed the allegations in both of the Division's reports, began on June 8, 1982, and continued periodically until September 28, 1982.

On September 28, 1982, the Commission rendered an opinion (A131a-A205a) in which it analyzed the extensive testimonial and documentary evidence which had been presented to it, and concluded that Local 54 president Gerace and executive board member Materio were disqualified under section 86(f) because they were associated with members of organized crime and conducted union affairs under the influence of those criminal associates, and that union business agent LaSane was disqualified under section 86(c) because of a 1973 criminal conviction for interference with commerce (extortion), aiding and abetting and conspiracy. The Commissioner also found that business agent Kirkland had a disqualifying conviction, but found evidence of rehabilitation and waived the disqualification. The Commission ordered the removal of the three disqualified officials, and stated that, if they continued to serve after October 12, 1982, the union would be prohibited from collecting dues from workers in the Atlantic City casino industry (A206a-A207a). The Commission also directed the parties to submit briefs on the applicability of the addditional statutory remedy of prohibition of pension and welfare fund administration.

Following the Commission's decision and order, the United States District Court issued an order enjoining the Commission and Division from taking any further steps to enforce section 93 against Local 54 pending resolution of the appeal and cross-appeals pending in the United States Court of Appeals (A129a-A130a). The injunction specifically did not prohibit the Commission from considering the applicability of the additional section 93 remedy. On October 12, 1982, the Commission issued a second opinion (A208a-A216), in which it ruled that the two remedies in section 93 can be applied alternatively, and that the dues prohibition remedy was sufficient to effect the removal of the three disqualified Local 54 officials, which is the statute's only intent and the Commission's only objective. The Commission therefore determined not to apply the alternative statutory remedy of prohibition of pension and welfare fund administration.

On November 11, 1982, Local 54 and Gerace appealed the Commission's disqualification order to the Superior Court of New Jersey, Appellate Division. In due course, Local 54 and Gerace filed briefs raising, *inter alia*, the same issues raised in the then pending appeal in the United States Court of Appeals. The Commission and Division filed answering briefs.

On June 6, 1983, the United States Court of Appeals issued an opinion (A1a-A77a), in which the majority ruled that the District Court had erred in refusing to grant the preliminary injunction requested by Local 54 and Gerace. Specifically, the majority ruled that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), insofar as it empowers the Commission to disqualify elected union officials (A31a), and is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975), insofar as it empowers the Commission to prohibt administration of pension and welfare funds (A32a-A33a). The majority also held that the Court was without jurisdiction over the cross-appeals, but considered the abstention arguments advanced by the

Commission and Division as a possible alternative ground for upholding the denial of the preliminary injunction. The majority ruled that the District Court did not err in declining to abstain (A36a-A37a).

The Honorable Edward Becker, Circuit Judge, dissented. Although Judge Becker agreed with the majority that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act (A38a), he found that section 93 is otherwise valid. Based on his analysis of congressional labor policy and "in view of the colossal problems associated with casino gambling, and New Jersey's interest in preventing the incidence of such problems and the poisoning of its polity," Judge Becker concluded that "federal labor law does not preempt the Casino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials" (A42a-A43a). Judge Becker also dissented from the ruling that the Court was without jurisdiction over the cross-appeals (A40a, n.2), but agreed that abstention is inappropriate in this case (A42a, n.3).

The Court of Appeals entered a judgment (A217a-A219a) reversing the judgment of the District Court and remanding for entry of an order enjoining the Commission and Division from taking any action, pending final hearing, to enforce section 93 against Local 54. The judgment also dismissed the cross-appeals for lack of jurisdiction.

The Commission and Division appealed to this Court. Local 54 and Gerace moved to dismiss the appeal in the Superior Court of New Jersey, Appellate Division, without prejudice, and the requested dismissal was granted.

Summary of Argument

I. Appellant New Jersey Casino Control Commission contends that, contrary to the ruling of the United States Court of Appeals, this case should be dismissed on the basis of the abstention doctrine first enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971).

The primary relief sought in plaintiffs' complaint was an injunction against ongoing state administrative proceedings. Those proceedings were instituted by the New Jersey Attorney General in vindication of the State's vital interest in protecting the integrity of its casino industry. Although the proceedings were administrative in nature, in view of their importance to the State and the fact that full due process rights were accorded to the parties, they merit the same deference due state judicial proceedings. Admittedly, the administrative proceedings did not provide a forum for resolution of a constitutional attack on the statute under which they were instituted, but resort to the state appellate courts, either on an interlocutory basis or at the conclusion of the administrative hearing, was always available. At the conclusion of the hearing Local 54 and Gerace did appeal to the New Jersey Superior Court, Appellate Division, and raised the same constitutional issues presented in this federal suit.

Under the principles of federalism and comity devoloped in *Younger* and its progeny, the injunction ordered by the Court of Appeals is clearly inappropriate. The Court has enjoined ongoing state proceedings of vital interest to New Jersey and has substituted itself for the New Jersey appellate courts. In deference to the State and its institutions, the federal courts should abstain from exercising jurisdiction in this case, and the case should be dismissed.

The Court of Appeals declined to abstain on the theory that *Younger* is inapplicable because plaintiffs challenged the right of the State to maintain the pending administrative proceedings. However, the *Younger* Court ruled that the conducting of state proceedings does not constitute irreparable harm justifying federal equitable relief, and thus there is no reason why a challenge to the validity of such proceedings should render *Younger* inapplicable. The Court of Appeals has thus announced a novel and ill-conceived exception to *Younger* and the Commission respectfully submits that this Court should

reverse the judgment of the Court of Appeals and remand to the District Court for entry for an order dismissing the complaint.

II. The United States Court of Appeals, by a vote of two to one, found that section 93 of the New Jersey Casino Control Act is preempted by section 7 of the National Labor Relations Act, and is therefore unconstitutional under the Supremacy Clause.

The majority of the Court of Appeals ruled that section 93 limits the right of employees to bargain collectively through representatives of their own choosing, as guaranteed by section 7 of the NLRA, and therefore that section 93 is "absolute[ly]" preempted (A27a-A28a). However, as the applicable Supreme Court case law makes clear, and as the dissent in the Court of Appeals stated, the validity of section 93 cannot be adjudged without considering the deeply-rooted local interests which lead to its passage, as well as the minimal disruption of federal labor policy which it entails. The majority of the Court of Appeals specifically declined to engage in any such weighing and balancing of the state and federal interests at stake. The dissent did engage in this balancing process, and concluded that section 93 is valid. Indeed, this conclusion is manifest in light of the vulnerability of New Jersey's casino industry to criminal infiltration, and the history of such infiltration of the industry in other jurisdictions, as well as the slight intrusion on federal labor policy represented by New Jersey's efforts to keep persons with criminal records and organized crime associations out of its casino industry labor unions.

The Court of Appeals therefore erred in ruling that section 93 of the Casino Control Act is preempted by section 7 of the National Labor Relations Act. If this Court reaches the merits of the preemption issue, the Commission respectfully submits that the judgment of the Court of Appeals invalidating section 93 should be reversed.

ARGUMENT

I. In view of the ongoing state proceedings in this matter, the Court of Appeals should have abstained from exercising jurisdiction and ordered that the complaint be dismissed.

The Commission and Division moved the District Court to dismiss the complaint in this matter on the ground of abstention, raising, *inter alia,* the abstention doctrine first enunciated in *Younger* v. *Harris,* 401 U.S. 37 (1971). The Court denied the motion (A91a). The Commission and Division raised the argument again on cross-appeal to the Circuit Court. The Court ruled, and the dissent agreed, that the District Judge was correct in declining to abstain.

In *Younger* v. *Harris* this Court reversed a District Court order enjoining a pending state criminal prosecution. The Court grounded its decision on the traditional doctrine that, absent extraordinary circumstances, a court of equity will not restrain a criminal prosecution, and on the "even more vital consideration" of "Our Federalism," *i.e.,* the principle of comity between the federal and state governments. The Court explained that this notion of comity includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fair best if the States and their institutions are left to perform their separate functions in separate ways." *Id.* at 45; *see also, Fenner* v. *Boykin,* 271 U.S. 240 (1926); *Ex parte Young,* 209 U.S. 123 (1908).

Although *Younger* dealt with a state criminal prosecution, subsequent cases have established that "Our Federalism" also prohibits federal court intervention in state civil proceedings which involve the vindication or enforcement of "important state interests." *See, e.g., Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975); *Juidice* v. *Vail,* 430 U.S. 327 (1977); *Trainor* v. *Hernandez,* 431 U.S. 434 (1977); *Moore* v. *Sims,* 442 U.S. 415 (1979). As this Court stated

in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982): "the policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved."

As discussed at length in Point Two of this brief, the state interests embodied in N.J. Stat. Ann. 5:12-93 and -86 (West Supp. 1983) are vital to New Jersey's struggle to assure the continuing viability and integrity of its casino industry. The Commission's hearing regarding Local 54 was conducted in furtherance of the State's compelling interest in attempting to prevent criminal involvement from strangling this fledgling industry. When compared to the interests at stake in the state proceedings involved in cases such as *Huffman* (action to enforce nuisance statute against pornographic theater), *Juidice* (contempt action for failure to appear at supplemental proceeding brought by judgment creditors), and *Trainor* (action seeking return of welfare payments and attachment of defendants' property), it is beyond dispute that the state interests involved here are sufficient to justify invoking the *Younger* doctrine in a civil context.

Nor should the fact the hearing which Local 54 sought to enjoin was before a state administrative agency rather than a court render the *Younger* abstention doctrine inapplicable.

Although the Casino Control Commission is not a court, it obviously acted in a judicial capacity in conducting the hearing in question in this case. The Commission adjudicated an action instituted by the state Attorney General against certain officials of Local 54. In so doing, the Commission accepted testimonial and documentary evidence, found facts, applied those facts to existing statutory law, and issued an appropriate order. This Court has consistently held that "the nature of a proceeding depends not on the character of the body but on character of the proceedings," and that a proceeding which "investigates, declares and enforces liabilities

as they stand on present or past facts and under laws supposed already to exist" is judicial. *District of Columbia Court of Appeals* v. *Feldman*, —— U.S. ——, 103 S. Ct. 1303, 1312 (1983), quoting *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908). Clearly, the hearing involved here was judicial in nature.

In adopting the Casino Control Act, the New Jersey Legislature took great pains to assure that adjudicative hearings before the Commission, such as the one involved here, would be held in a trial-type atmosphere and with the full panoply of due process protections. As previously noted, the Act creates two agencies, and thus separates the investigatory and prosecutorial functions, which are placed in the Division, from the adjudicative function, which is placed in the Commission.

With regard to Commission hearings, the Act provides procedures for the filing and service of complaints and answers, N.J. Stat. Ann. 5:12-108 (West Supp. 1983), and requires that the hearings be transcribed, N.J. Stat. Ann. 5:12-107(a)(2) (West Supp. 1983), and that evidence be taken under oath. N.J. Stat. Ann. 5:12-107 (a)(3) (West Supp. 1983). The Act also requires that parties be afforded the right to call witnesses, produce documentary evidence, cross-examine opposing witnesses, impeach witnesses, produce rebuttal evidence, N.J. Stat. Ann. 5:12-107(a)(4) (West Supp. 1983), and enter into stipulations. N.J. Stat. Ann. 5:12-107(a)(7) (West Supp. 1983). There are provisions relating to judicial notice, N.J. Stat. Ann. 5:12-107(d) (West Supp. 1983), and rehearings on the basis of newly discovered evidence. N.J. Stat. Ann. 5:12-107(d) (West Supp. 1983). The Commission is granted the power to issue subpoenas, administer oaths, and serve its process in the manner provided in the rules of court, N.J. Stat. Ann. 5:12-65 (West Supp. 1983), and the right to grant testimonial immunity. N.J. Stat. Ann. 5:12-67 (West Supp. 1983). The Commission is also required, if it denies an application, to issue an order and a statement of reasons therefor, N.J. Stat. Ann. 5:12-94 (West Supp. 1983), and the right of

direct appeal to the New Jersey appellate courts is guaranteed. N.J. Stat. Ann. 5:12-110 (West Supp. 1983).

The Act guarantees the independence of the Commission members and staff through pre-employment restrictions, N.J. Stat. Ann. 5:12-58 (West Supp. 1983), post-employment restrictions, N.J. Stat. Ann. 5:12-60 (West Supp. 1983), and a variety of ethical constraints. N.J. Stat. Ann. 5:12-52(g)-59 and -62 (West Supp. 1983). The Act also has provisions assuring the separation of the Commission from the political process. N.J. Stat. Ann. 5:12-51 and -70(k) (West Supp. 1983). In short, the Commission functions very much in the manner of a court and its hearings are very much in the nature of trials.

This Court first dealt with *Younger* in the context of a trial-type administrative proceeding in *Geiger* v. *Jenkins*, 401 U.S. 985 (1971). There the Court summarily affirmed a District Court's dismissal of an action seeking to enjoin on constitutional grounds a license revocation hearing before a State Board of Medical Examiners.

In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), in which plaintiff sought to enjoin a license revocation hearing before a State Board of Optometry, this Court observed that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings. . . ." *Id.* at 576-577.

In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), plaintiff, whose unemployment compensation claim was pending before the state Board of Review, filed a federal suit challenging the state unemployment compensation statute on the ground that, *inter alia*, it was preempted by the federal statutory law. Before this Court, the state authorities did not seek a dismissal on the basis of *Younger*, and when that possibility was raised at oral argument they "resisted the suggestion." *Id.* at 479. This Court did not dismiss, noting that, when a state voluntarily submits to a federal forum, principles of comity

and federalism do not require federal courts to "force the case back into the State's own system." *Id.* at 481.[5]

However, the *Younger* abstention issue was raised in *Hodory* in one of the *amicus* briefs, and the Court chose to discuss it. The Court said that *Younger* "reflects 'a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.'" The Court added that *Younger* and its progeny are "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Id.* at 480-481.

In *Simopoulis* v. *Virginia State Board of Medicine*, 644 F. 2d 321, 326-327 (4 Cir. 1981), the Fourth Circuit commented that "[t]he term 'state tribunal' in *Hodory* was undoubtedly used advisedly and clearly would comprehend a state administrative proceeding, particularly if the decision of the state administrative agency were subject to appeal to the state courts under procedures permitting the assertion of constitutional claims."

In *Williams* v. *Red Bank Board of Education*, 662 F. 2d 1008, 1016 (3 Cir. 1981), the Third Circuit upheld a dismissal of a federal action by a teacher who was the subject of a pending tenure termination proceeding, stating:

> . . . the fact that the pending state proceeding is administrative rather than judicial should not by itself foreclose the application of the *Younger* doctrine. Administrative regulation often forms a crucial aspect of a state's implementation of its laws, and to bar *Younger* abstention simply on

[5] As previously noted, the extarordinary regulatory apparatus created to control the Atlantic City casino industry consists of two separate state agencies, the Commission and the Division. Although the Division now requests a determination by this Court of the preemption issue, the Commission, which is the state adjudicative agency whose process has been stayed by the federal courts, asserts that a dismissal on the bases of *Younger* is appropriate.

> the ground that the pending proceedings are 'administrative' could easily undermine important state policies and concerns. Such a result would not respect the Supreme Court's repeated admonitions that the more vital consideration underlying *Younger* is the notion of comity.

The Second Circuit has likewise stated that *Younger* is applicable to state administrative proceedings. *McCune* v. *Frank,* 521 F.2d 1152, 1157-1158 (2 Cir. 1975), and the federal district courts have applied *Younger* in a variety of administrative contexts. *See, e.g., McDonald* v. *Metro-North Commuter R.R. Div.,* 565 F.Supp. 37 (S.D.N.Y. 1983) (police disciplinary proceedings); *MacRea* v. *Motto,* 543 F.Supp. 1007 (S.D.N.Y. 1982) (firefighter disciplinary proceeding); *Holy Spirit Ass'n* v. *Town of New Castle,* 480 F. Supp. 1212 (S.D.N.Y. 1979) (zoning board hearing); *Rucker* v. *Wilson,* 475 F. Supp. 1164 (E.D. Mich. 1979) (medical board proceeding); *Rosko* v. *Pagano,* 466 F. Supp. 1364 (D.N.J. 1979) (police disciplinary proceeding); *Schachter* v. *Whalen,* 445 F. Supp. 1376 (S.D.N.Y. 1978), aff'd on other grounds, 581 F.2d 35 (2 Cir. 1978) (medical board hearing); *Lang* v. *Berger,* 427 F.Supp. 204 (S.D.N.Y. 1977) (medicaid disqualification hearing).

At least where, as here, an administrative tribunal is adjudicating matters of vital concern to the State, and affords the litigants the full panoply of due process rights, there is no reason for *Younger* to be any less applicable than it is where court proceedings are involved.

Another prerequisite for a *Younger* dismissal is that the state proceedings provide "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill, supra,* at 577. Local 54 clearly has an adequate state forum in which to raise its federal issues. Admittedly, the Commission refused to rule on the constitutionality of N.J. Stat. Ann. 5:12-86 and -93 (West Supp. 1983) when requested to do so by Local 54. Although the Commismission lacks the power as an administrative agency to rule on the facial constitutionality of its enabling statute, the state court system is fully competent to address such

issues. Pursuant to N.J. Ct. R. 2:5-6, Local 54 could have applied for leave to appeal from the Commission's interlocutory decision.

Moreover, Local 54 always had the right, upon the natural termination of the Commission's hearing, to a direct appeal to the New Jersey Superior Court, Appellate Division. *See,* N.J. Stat. Ann. 5:12-110(a) (West Supp. 1983), N.J. Ct. R. 2:2-3(a). As the District Court stated in *Williams* v. *Red Bank Board of Education,* 502 F. Supp. 1366, 1371 (D.N.J. 1980),

> . . . whether or not an administrative body can competently determine sensitive First Amendment issues, plaintiff's opportunity to raise her First Amendment claims in the state forum is adequate because she has an appeal as of right to the New Jersey Appellate Division which is a "forum competent to vindicate any constitutional objections".

In *Anonymous* v. *Association of the Bar of City of N.Y.,* 515 F.2d 427 (2 Cir. 1975), *cert.* den., 423 U.S. 863 (1975), the Court upheld the dismissal of an action seeking to enjoin an attorney disciplinary proceeding, noting that "[w]hatever constitutional questions are involved can certainly be raised in the state courts. . . ." *Id.* at 432.

Similarly, in *Rucker* v. *Wilson,* 475 F. Supp. 1164 (E.D. Mich. 1979), the District Court dismissed a federal suit instituted during the pendency of a hearing before the State Board of Medicine, stating that the available state appeal from the administrative determination provided "more than adequate protection for the constitutional rights involved." *Id.* at 1166.

Not only has Local 54 always had the right to raise its constitutional challenge to section 93 of the Casino Control Act in the New Jersey courts, it has in fact done so. After the hearing before the Commission terminated, Local 54 and Frank Gerace appealed to the New Jersey Appellate Division, and raised the same issues presented in the then pending appeal to the Third Circuit Court of Appeals. At the request of Local 54 and Gerace, the state appeal was dismissed without prejudice after the issuance of

the Third Circuit opinion. However, it is clear that the State has provided "a forum competent to vindicate any constitutional objections" which Local 54 seeks to raise, and therefore that federal court intervention is unwarranted. *Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 604.

Moreover, where, as here, the trial phase of the state proceedings has been completed, federal court intervention is particularly inappropriate, because it deprives the State of its legitimate function of providing appellate court review. The principles of comity and federalism which under *Younger* are ill-served when federal courts substitute themselves for state appellate courts. As this Court noted in *Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 608-609, such intervention is even more disruptive and offensive than pre-trial intervention by federal courts, and is "also a direct aspersion on the capabilities and good faith of state appellate courts."

The District Court declined to apply *Younger* abstention in the present case because, in its words, "the state proceedings have not been initiated by the state itself" (A91a). On appeal to the Court of Appeals, the Commission and Division argued that the proceedings against Local 54 clearly were initiated by the State, *i.e.,* by the Division of Gaming Enforcement, and that, in any event, the controlling consideration is the presence of an important state interest, not initiation by the State. *See, e.g., Middlesex County Ethics Committee* v. *State Bar Association, supra,* 457 U.S. at 423.

The Circuit Court also declined to apply *Younger* abstention, but did not mention the "state initiation" test utilized by the District Court. Thus, the Court apparently rejected the District Court's rationale. In its place, both the majority and dissenting opinions of the Circuit Court reasoned that the principles of *Younger* are not applicable here because Local 54 challenged the validity of the proceedings before the Commission. In the words of the majority:

> . . . when the issue tendered to the federal district court is the very power, as a matter of fed-

> eral law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger* v. *Harris* rule are totally inapplicable. [A36a-A37a].

The dissent agreed, stating that, while "at first blush, this case appears to fall within the class of cases in which the district courts should abstain from adjudicating the claims at issue," abstention is nonetheless inapplicable here because:

> Where an individual who is subject to state proceedings to which the federal courts would otherwise defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. [A42a, n.3].

In ruling that *Younger* is rendered inapplicable by the mere assertion that federal law protects against maintenance of a state proceeding, both the majority and the dissent overlooked the fact that *Younger* itself dealt with a First Amendment challenge to the state statute under which a criminal prosecution was being conducted. Nevertheless, this Court declared that the mere holding of the state proceeding did not constitute irreparable harm justifying equitable relief in federal court. *Younger* v. *Harris*, *supra*, 401 U.S. at 46, 48-49. In the present case the District Court specifically ruled that the holding of the hearing before the Commission would not constitute irreparable harm (A107a-A108a; A125a-A128a), and neither of the opinions in the Court of Appeals expressed any contrary conclusion. It is therefore unclear why the fact of a challenge to the legitimacy of state proceedings justifies federal court intervention in a case otherwise within the purview of *Younger*.

In fact, the *Younger* Court said that federal intervention in an ongoing state proceeding would not be justified by even irreparable injury, unless it was "both great and immediate." *Id.* at 46. The Court went on to conclude that only in cases where bad faith or harassment had been demonstrated would federal injunctive relief be called

for. *Id.* at 46-50. Local 54 is not claiming the proceeding against it was conducted in bad faith, but merely that it was conducted under an unconstitutional statute.

The *Younger* Court noted one situation in which irreparable harm could be shown even in the absence of bad faith or harassment, *i.e.*, where the statute under attack was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.* at 57, quoting *Watson* v. *Buck*, 313 U.S. 387, 402 (1941). The validity of section 93 is discussed a length in Point II of this brief. However, it is clear that section 93 does not fall within the above-quoted exception to *Younger*, and neither of the opinions of the Court of Appeals suggests that it does. Rather, the Court created a new exception, which renders *Younger* inapplicable whenever there is a colorable claim that the holding of a state proceeding offends a federal enactment.

In support of its conclusion, the majority below cited *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Ed.*, 654 F. 2d 868 (3 Cir. 1981), for the proposition that, "absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1966), escape any federal appellate review for long periods" (A36a). The issue in the *New Jersey-Philadelphia Presbytery* case was the applicability of *Younger* to a federal suit instituted by persons who were not parties to an ongoing state action. The Court said that where such persons cannot intervene in the state action, and can only protect their interests in a separate action under 42 U.S.C. §1983 (1981), they might legitimately choose the federal forum because the Supreme Court can review interlocutory injunctive orders of lower federal courts but can only review final judgments of state courts. 654 F. 2d at 883-884.

The *New Jersey-Philadelphia Presbytery* opinion was issued over a vigorous dissent, which pointed out that

the majority misperceived the extent of Supreme Court appellate jurisdiction. 654 F. 2d at 904-905. At any rate, even the majority opinion in *New Jersey-Philadelphia Presbytery* did not suggest that *Younger* is inapplicable whenever it is claimed that an order of a state court or agency restrains the exercise of some federal right. In fact, *Younger* itself concerned a claim that the California Criminal Syndicalism Act, under which the state criminal prosecution there involved was instituted, inhibited the exercise of First Amendment rights, 401 U.S. at 784, and the *Younger* opinion does not even mention the possibility that such an allegation could provide a justification for a federal court to enjoin an ongoing state proceeding. To the contrary, *Younger* denounced the implicit denial of the equal ability of the state courts to order a fair and competent determination of federal issues which inheres in such an assertion.

As additional authority, the majority in the present case cited *In re Green's Petition*, 369 U.S. 689 (1962), and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), for the proposition that "the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter" (App. A, 36a). These cases did involve rights under section 7 of the National Labor Relation Act, and did hold that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." *In re Green's Petition*, 369 U.S. at 694; *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. at 386, 399. However, this was a holding of general applicability and was not related to any particular significance granted section 7 rights. In addition, these cases come to this Court on *certiorari* from the highest courts of the states involved, and did not entail federal intervention in ongoing state proceedings.

Finally, the majority cited *Capitol Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954), and *NLRB* v. *Nash-Finch Co.*, 404

U.S. 138 (1971), for the proposition that "[e]ven pending state proceedings may be enjoined on preemption grounds" (App. A, 36a). Both of these cases involved attempts by the National Labor Relations Board to restrain enforcement of injunctions issued by state courts against peaceful picketing. In both cases the sole issue was whether the so-called Anti-Injunction Act, 28 U.S.C. §2283 (1978), precluded the granting of the requested relief. In neither case was abstention raised or discussed.

The majority of the Court of Appeals stated that the cases discussed above "suggest" that *Younger* is inapplicable where a federal plaintiff challenges the propriety of state proceedings (A36a-A37a). It is respectfully submitted that these cases do not support the conclusion reached by the Court, and that *Younger* itself clearly precludes that conclusion.

The dissent placed its reliance on cases involving claims of double jeopardy (A42a, n.3). For example, the dissent cited *Abney* v. *United States,* 431 U.S. 651 (1977), holding that a denial of a claim of double jeopardy is an appealable collateral order, and *United States ex rel. Webb* v. *Court of Common Pleas,* 516 F.2d 1034, 1037 (3 Cir. 1975), holding that pretrial *habeas corpus* relief is available to a defendant who seeks to avoid trial on the ground of double jeopardy and whose double jeopardy claims have been denied by the state's highest court. These cases, and the others cited by the dissent, are grounded on the notion that the prohibition of double prosecution for a single offense is intended to spare defendants the embarrassment, expense and ordeal of a second trial. *Abney,* 431 U.S. at 661-662; *Webb,* 516 F.2d at 1040-1041. In *Younger* the Court, in discussing the showing of irreparable harm which is necessary to justify federal injunctive relief against an ongoing state proceeding, stated:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected right must

> be one that cannot be eliminated by his defense against a single criminal prosecution. [401 U.S. at 46].

The cases cited by the dissent present a unique situation in which a trial itself constitutes an injury against which a defendant is afforded federal constitutional protection, as contrasted with the *Younger* case, and the present case, in which the holding of the single state proceeding does not constitute an irreparable injury. The cases cited by the dissent clearly do not support the conclusion that a plaintiff is entitled to federal relief whenever there is a colorable allegation that some federal constitutional or statutory right entitles him to avoid participating in a single state proceeding.

In summary, it is respectfully submitted that both the majority and dissenting opinions have announced a novel, ill-conceived, and unsupported exception to the *Younger* rule. If this exception is allowed to stand, and federal plaintiffs can avoid the impact of *Younger* merely by alleging that they should not be subjected to state proceedings, the principles of comity and federalism underlying the *Younger* abstention doctrine will be rendered meaningless. The Commission therefore urges this Court to remand to the District Court for entry of an order dismissing the complaint in this matter.

II. The ruling below, that New Jersey is powerless to prevent the subversion of its casino industry through criminal infiltration of the industry's labor organizations is based on a misapprehension of the doctrine of federal preemption.

The substantive issue in this case is whether section 93 of the New Jersey Casino Control Act, which seeks to prevent corruption of the Atlantic City casino industry by imposing certain disqualification standards on officials of labor unions operating within that industry, so offends national labor policy as to be invalid under the Supremacy Clause, U.S. Const., Art. VI, cl. 2.

The majority of the Court of Appeals held that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1983), (A31a).[6] According to the majority, section 93, by empowering the Commission to disqualify casino industry union officials, and to prohibit dues collection if the disqualified officials continue to serve, impermissibly intrudes on the absolute and unqualified section 7 right of employees to "bargain collectively through representatives of their own choosing." The dissent concluded that section 7 rights are not absolute, that section 93 does not offend national labor policy, and that the two enactments can peacefully coexist.

Analysis of the preemption issue must begin with this Court's decision in *Hill* v. *Florida,* 325 U.S. 538 (1945). *Hill* involved a Florida statute which required, in section 4, that union "business agents" obtain a state license. A license could be denied to any applicant who had not been a citizen of the United States for ten years, had been convicted of a felony, or was not of "good moral character." The statute also required, in section 6, that unions pay a $1.00 registration fee and file an annual report with the Secretary of State of Florida. Violation of section 4 or 6 was punishable as a misdemeanor.

Hill was a business agent within the meaning of the Florida statute, but he had not applied for a license as

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[6] The Court of Appeals also held that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975). However, this issue need not have been addressed by the Court of Appeals and need not be addressed by this Court, because the pension and welfare fund remedy was not invoked by the Commission in this case. If this Court does reach the issue, the Commission adopts the arguments advanced by co-appellants Division of Gaming Enforcement, *et al.*, in support of the validity of this portion of the statute. However, the Commission also notes that, in view of the broadly-framed severability clause of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-133(a) (West Supp. 1983), it is clear that this remedy, should it ultimately be found unconstitutional, could be severed without altering the character or purpose of Section 93.

required by section 4, nor had his union registered as required by section 6. The Florida courts enjoined Hill from acting as a business agent until he obtained a license and enjoined his union from functioning as such until it registered.

This Court reversed, finding the statute preempted by section 7 of the NLRA. The Court indicated that the filing and registration provisions of the Florida statute were valid, but that the criminal and injunctive sanctions had the effect of denying Florida trade union members the federally guaranteed "full freedom" to select bargaining representatives of their own choosing. *Id.* at 541-543.

The majority opinion in the present case found *Hill* controlling (A31a).[7] However, as the dissent recognized, in view of the distinctions between section 93 of the Casino Control Act and the statute invalidated in *Hill,* and the development of federal statutory and case law since *Hill,* section 93 cannot be so easily cast aside.

Hill involved an attempt to regulate *all* labor unions in Florida. Section 93 only affects unions in a unique, local industry, which operates in a single municipality. The Florida statute imposed broad licensing standards, including "good moral character," whereas section 93 refers only to particular facts or circumstances and places the burden on the State to demonstrate their existence. The statute struck down in *Hill* was not grounded in any historically-explained and deeply-felt local concern, but was merely an attempt to erect a state regulatory system over labor unions. Section 93 was enacted as part of an overall regulatory system designed to address New Jersey's deeply-rooted interest in protecting its fledgling casino industry from criminal infiltration. New Jersey is not at-

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[7] In fact, the majority read *Hill* as compelling the conclusion that section 93 is invalid in its entirety, and went so far as to describe the hearing before the Commission as an "illegal proceeding" (A34a). As Judge Becker pointed out, even if the case is read as invalidating the sanction provisions of section 93, "*Hill* simply cannot be construed as affecting the validity of the non-sanction provisions" (A52a, n.5).

tempting to regulate labor unions; it is attempting to regulate casinos, and it is attempting to do so without conflicting with legitimate collective bargaining rights. Thus, *Hill* is factually inapposite.

With respect to legal developments subsequent to *Hill*, in 1959 Congress enacted the Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§401-530 (1976). Section 504(a) of the LMRDA prohibits individuals convicted of certain felonies from holding union office for five years thereafter. Congress imposed these disqualification criteria largely because state and local authorities had failed to adopt "effective measures to stamp out crime and corruption [in unions] and to guaranty internal union democracy. . . ." *Sen. Rep. No. 187, 86th Cong., 1 Sess.*, April 14, 1959, p. 6; *U.S. Code Cong. & Admin. News*, p. 2322 (1959), quoted in *Intern. Longshoremen's etc.* v. *Waterfront Comm'n, etc.*, 495 F. Supp. 1101, 1123 (S.D. N.Y. 1980), aff'd in part and rev. in part on other grounds, 642 F. 2d 666 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981).

That the section 504(a) disqualification criteria were not intended to preclude state enactments in the area is made clear by section 603(a) of the LMRDA, 29 U.S.C. §603(a) (1975), which provides that "nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward or other representative of a labor organization . . . under the laws of any State." Although the majority in the present case said that section 603(a) only applies to state law remedies for breach of fiduciary duties by union officials (A24a-A27a), the dissent pointed out that there is no support for such a restrictive reading in the legislative history (A57a-A58a). Moreover, in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), Justice Frankfurter's plurality opinion, in which Justice Brennan concurred, declared that, in light of section 603(a), "no inference could possibly arise that [a New York statute imposing broader disqualification criteria] is implicitly preempted by section 504(a)." *Id.* at 157. *Accord, Intern. Longshoremen's Ass'n* v. *Waterfront*

Com'n, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (Sup. Ct. 1981).

Thus, as of 1959 the "full freedom" of employees to elect bargaining representatives was no longer absolute, Congress having imposed limits in section 504(a) of the LMRDA and having expressly refused to preempt the the states from taking action to the same effect.[8]

In *DeVeau* v. *Braisted, supra,* this Court upheld, against a preemption challenge, section 8 of the New York Waterfront Commission Act, Title 29, N.Y. Unconsol. Laws, §9933 (McKinney, 1974), which provides that no person shall collect dues on behalf of a waterfront union if any officer or agent of the union has been convicted of a felony and has not been pardoned or granted a "certificate of good conduct" from a parole board.

Section 8 of the Waterfront Commission Act is, if anything, broader in scope than sections 93 and 86 of the Casino Control Act. Unlike the New Jersey statutes at issue here, section 8 does not allow waiver of a disqualification or place any temporal limits on a disability. *Compare,* N.J. Stat. Ann. 5:12-86(c)(4) (West Supp. 1983).

Justice Frankfurter (plurality opinion), noted that under section 8 of the Waterfront Commission Act, waterfront employees do not have complete freedom of choice in selecting bargaining representatives, because the choice of a convicted felon would cause the union to be disabled from collecting dues. *Id.* at 152. However, Justice Frankfurter added that section 8 did not conflict with or seriously impede section 7 of the NLRA, and that

> [t]he fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of fed-

[8] It should also be noted that in 1978 Congress decreed that any labor union seeking to represent employees of the federal government must be "free from corrupt influences or influences opposed to basic democratic principles," and imposed substantial registration and filing requirements on such unions. Pub. L. No. 95-454, 5 U.S.C. §7120 (1978).

> eral and state interests and of the interaction of federal and state powers. [*Id.* at 152].

Justice Frankfurter continued:

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [*Id.* at 153]

Upon examining the legislative record preceding the enactment of section 8, Justice Frankfurter concluded that the statute vindicated "a legitimate, compelling state interest, namely, the interest in combating local crime infesting a particular industry." *Id.* at 154-155. Balancing the substantial local concern against the incidental infringement of the freedom of workers to elect representatives, the Court concluded that section 8 was not preempted by section 7 of the NLRA.

While *DeVeau* rejected an inflexible approach to section 7 preemption issues in favor of a balancing of the competing interests, in the present case the majority of the Circuit Court ruled that, because section 93 infringes upon the right of employees to elect representatives of their own choosing, it is "absolute[ly]" preempted and there is "neither occasion nor justification for engaging in weighing or balancing" of the state and federal interests involved (A27a-A28a). Thus, the majority did exactly what Justice Frankfurter cautioned against, *i.e.*, misconceived the doctrine of preemption by "decid-[ing] this case mechanically on an absolute concept of free

choice," and declined to face the despositive question of whether Congress would consider section 93 "a true, real frustration" of national labor policy. *DeVeau* v. *Braisted, supra* at 153.

According to the majority below, *DeVeau* carries no force as precedent because it turned on congressional approval of a bi-state compact, and because Justice Frankfurter wrote only for a plurality. Both reasons are invalid.

The bi-state compact involved in *DeVeau* was an agreement between New York and New Jersey to jointly regulate their common waterfront. As required by Art. I, cl. 10, of the Constitution, the compact was submitted to Congress, and it was approved. Section 8 of the Waterfront Act was not part of the bi-state compact, but was part of the New York implementing legislation. The New Jersey implementing legislation contained an identical provision. N.J. Stat. Ann. 32:23-80 (1963). Both states had enacted the implementing legislation prior to the approval of the compact by Congress. However, as Justice Frankfurter explained, in approving the compact

> Congress was fully mindful of the specific provisions of §8. Not only had §8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International Longshoremens Association, as a ground of opposition to Congressional consent, that approval of the compact by Congress would carry with it sanction of §8. [Citations omitted.] The ground of objection to the section which is appellant's primary reliance here, namely, that it conflicts with existing federal labor policy, was urged as a ground for rejection of the compact. [*Id.* at 151.]

In light of this legislative background, Congress took the unprecedented step of expressly consenting to the implementing legislation, although it was not part of the compact. *Id.* at 151; 154. Thus, Congress expressed its view that section 8 is compatible with federal labor policy.

Congress did not amend or modify existing labor law, since the compact itself stated:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any way individually, collectively, and through labor organizations or other representatives of their own choosing. . . .

N.J. Stat. Ann. 32:23-68 (1963); Title 29, N.Y. Unconsol. Laws, §9868 (McKinney, 1974). Thus, the compact embodied provisions identical to section 7 of the NLRA. *See, Local 824* v. *Waterfront Com'n.*, 16 Misc. 2d 632, 182 N.Y.S. 2d 481, 484 (Sup. Ct. 1958), aff'd, 7 A.D.2d 630, 179 N.Y.S. 2d 843 (App. Div. 1958), app. dism., 6 N.Y. 2d 861, 188 N.Y.S. 2d 562, 160 N.E. 2d 93 (Ct. App. 1959), *cert.* den., 361 U.S. 835 (1959). Necessarily, then, Congress approved a compact which by its terms embodies and protects the statutory right of employees to bargain collectively through representatives of their own choosing, and at the same time expressly consented to implementing legislation precluding convicted felons from serving as labor union officials. The only conclusion to be drawn is that Congress did not view the section 8 limitations as an infringement of rights embodied in section 7 of the NLRA.

As Justice Frankfurter explained, Congressional approval of the bi-state compact and the implementing legislation relieved the Court of the task of having to "imaginatively summon the likely reaction of Congress to the state legislation." *Id.* at 153. He concluded that, in view of Congress's clear statement on the subject, "it would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in §8." *Id.* at 154-55.[9]

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[9] Clearly, this was the correct understanding of the compact, for

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Thus, *DeVeau* did not pivot on the existence of the compact. Rather, the plurality opinion makes clear that a reconciliation of interests is mandated, but that the search for Congressional intent is paramount. The compact merely provided an extraordinary opportunity for Congress to directly express its view on the implementing legislation. In short, *DeVeau* is not a bi-state compact case and cannot be discarded on that basis. As Judge Becker stated:

> "Justice Frankfurter's formulation strongly implies that a Court without access to similarly conclusive extrinsic evidence nevertheless should attempt to determine whether Congress would have intended to preclude the particular state legislation at issue." [A61a].

As noted, the majority also saw no precedential value in *DeVeau* because Justice Frankfurter's opinion was only a purality opinion. The majority said that Justice Brennan, who concurred in the ruling that section 8 was not preempted, "made it clear that he relied on Congressional intent in approving the compact" (A29a). On the contrary, Justice Brennan considered the state interests behind section 8, and said that he "believe[d] that New York's disqualification of ex-felons from waterfront union offices, on all of the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate aim. . . ." *Id.* at 160-161.

In summary, *DeVeau* clearly stands for the proposition that, in addressing a deeply-rooted and legitimate local interest, a state may impose disqualification criteria broader than those in section 504(a) of the LMRDA.

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> . . . the requirement that Congress approve a compact is to obtain its political judgment: *Is the agreement likely to interfere with federal activity in the area,* is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation? [*Cuyler* v. *Adams*, 449 U.S. 433, 441, n.8 (1981), quoting *United States Steel Corp.* v. *Multistate, Tax Com'n.*, 434 U.S. 452, 485 (1978), White, J. dissenting; emphasis added].

However, the *DeVeau* Court also stated that it was not overruling *Hill* v. *Florida, see,* 363 U.S. at 152, which, of course, was predicated on the "full freedom" of employees to elect representatives of their own choosing. Certainly, it cannot be contended that section 8 of the Waterfront Commission Act, or section 93 of the Casino Control Act, do not in some measure limit the full freedom of certain employees to elect representatives. It thus must be concluded that *DeVeau* does to some extent modify *Hill.* It is likewise clear that section 504(a) of the LMRDA limits "full freedom" and therefore modifies the *Hill* rule.

While the Commission is not asking this Court to overrule *Hill,* it is asking the Court to recognize that the *Hill* doctrine of "full freedom" is not absolute, and that, in light of *DeVeau* and 504(a), the doctrine admits of an exception in cases where a historically-explained, deeply-felt local concern has been addressed by the imposition of certain limited disqualification criteria on trade union officials.[10] Moreover, recognition of such an exception to the notion of "full freedom" would not, in fact, call upon this Court to do anything other than to treat this case in accordance with its own established and often repeated guidelines for dealing with NLRA preemption issues.

Throughout the existence of the NLRA, Congress has refrained from giving direction as to its in-

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[10] Although the majority below stated that the Commission and Division contended that *DeVeau* overruled *Hill* (A28a), the dissent correctly pointed out that no such argument was made (A63a, n.14). The continuing validity of *Hill* has been questioned, *Fitzgerald* v. *Catherwood,* 388 F.2d 400, 460 (2 Cir. 1968), *cert. den.,* 391 U.S. 934 (1969), but the Commission has never contended that the case has been overruled and does not now contend that it should be overruled. Rather, the Commission believes that the result in *Hill* might well be the same today, even under the balancing principles espoused by this Court in more recent preemption cases. However, it is the sweeping and absolute language of the *Hill* decision which must be delimited to permit the appropriate competing-interest analysis.

tended preemptive effect, and thus left the issue of preemption to the courts. *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 296 (1977), *Gorman, Basic Text on Labor Law Unionization and Collective Bargaining*, 776 (1976). As the Court stated in *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 488 (1953), the NLRA "leaves much to the states, although Congress has refrained from telling us how much."

Faced with Congressional silence, this Court has developed a preemption doctrine based primarily on two competing considerations—the need for uniform national labor regulation under the NLRA, and the recognition that state regulation of activity which is merely a peripheral concern of the NLRA, or which touches interests deeply rooted in local feeling and responsibility, must be allowed to stand. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 233-244 (1959); *Farmer* v. *Carpenters Local 25, supra* at 295-296; *Belknap* v. *Hale*, —— U.S. ——, 103 S.Ct. 3172, 3177 (1983). The ultimate objective is to discover Congressional intent, a frequently difficult task which can only be undertaken on a case by case basis. For this reason, the Court has refused to declare state regulation preempted solely because it involves labor policy in some way. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).

Recently, in *Local 926, Inter. Union of Oper. Eng.* v. *Jones*, —— U.S. ——, 103 S. Ct. 1453, 1458-1459 (1983) the Court reiterated its approach to NLRA preemption issues as follows:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S., at 245, 79 S. Ct., at 779; [other citations omitted]. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion", *Sears, Roebuck & Co.* v. *Carpenters*, [436 U.S. 180] at 188, 98 S. Ct., [1745] at 1752 [(1978)], if the conduct at issue is arguably prohibited or pro-

> tected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra,* 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the conduct at issue is only a peripheral concern of the Act or touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra,* 359 U.S., at 243-244, 79 S. Ct., at 778.

In the present case the majority of the Court of Appeals misapprehended the *Garmon* rule, and established its own rule of absolute preemption where a state regulation in any way implicates or restricts activity protected by section 7. In order to justify this rule, the majority restricted the *Garmon* balancing approach to cases where the State seeks to regulate conduct which is not protected by section 7, "but is nevertheless federally regulated" (A27a).

Garmon does not establish two preemption doctrines, one absolute and one relative. *Local 926* clarifies that *Garmon* establishes a single rule under which state regulation of matters actually or arguably within the purview of the NLRA is ordinarily, but not necessarily preempted. As explained in *Farmer* v. *Carpenters Local 25, supra,* 430 U.S. at 296-297:

> . . . the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of the power to act." *Garmon* at 243-244.
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> . . . These exceptions "in no way undermine the vitality of the pre-emption rule." [*Vaca* v. *Sipes*]

> 386 U.S. [171] at 189 [(1967)]. To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.

As this Court further explained in *Local 926, supra,* 103 S.Ct. at 1458:

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens. See *Sears, supra,* 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra,* 430 U.S., at 297, 97 S. Ct., at 1061.

The respect for state enactments demonstrated in *Garmon, DeVeau* and the other cases cited herein is by no means unique to NLRA preemption issues. This Court has consistently held that the "existence of federal supremacy is not lightly to be presumed," *New York State Dep't of Social Serv.* v. *Dublino,* 413 U.S. 405, 413 (1973), and, indeed, is not favored in the absence of a persuasive showing that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311 (1981). Nor is there any basis to conclude, as the majority below seems to have done, that section 7 rights have somehow acquired a status which places them outside of the normal preemption analysis. The *Garmon* balancing approach clearly establishes that this is not the case.[11] When

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[11] In *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum.,* 445 U.S. 97 (1980), the Court was faced with a conflict between the Sherman Act, 15 U.S.C. §1 *et seq.,* which it described as "the Magna Carta of free enterprise," *id.* at 111, and California's wine pricing statute. The Court ruled that it was required to "harmo-

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the required balancing of the federal and state interests involved in the present case is performed, the result must be similar to that reached by the Court in *DeVeau,* and the same as that espoused by the dissent in the Court of Appeals, *i.e.*, that section 93 is not preempted by section 7 of the NLRA.

As Judge Becker concluded, it is beyond dispute that the concerns of New Jersey's Legislature and citizenry embodied in section 93 "cannot be characterized as anything less than 'deeply rooted in a local feeling and responsibility'" (A64a; A72a). The District Judge had reached the same conclusion in his opinion (A106a). Indeed, this conclusion is manifest in light of the history and purpose of section 93.

Section 93 is one part, albeit an important part, of New Jersey's effort to control gaming and harness its economic potential for the public welfare. Gambling itself is distinctively a state problem that is to be governed, controlled, and regulated by the individual states. *State* v. *Rosenthal,* 93 Nev. 36, 559 P. 2d 830, 836 (Sup. Ct. 1977), appeal dism., 434 U.S. 803 (1977). For its part, the federal government has traditionally refrained from interferring with the freedom of the states to determine their own gambling policies. Congress has generally protected the autonomy of the states, by exempting state-legalized gambling from the application of the federal criminal laws. In fact, Congress has justified its actions as designed to assist the states in the enforcement of their gambling laws. *See, Final Report*

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nize state and federal powers," *id.* at 110, and to reconcile the "competing state and federal interests" involved. *Id.* at 111. Thus, in dealing with anti-trust statutes, which are certainly as central to our economic and political system as federal labor laws, this Court has balanced competing local and national interests, and has been reluctant to cast aside state enactments which are intended to control an industry posing unusual regulatory difficulties and potential harm to the State and its residents.

of Commission on the Review of the National Policy Toward Gambling (1976), at 9, 11.[12]

In New Jersey gambling was long prohibited by the State Constitution. *See,* N.J. Const. of 1844, Art 4, §7, par. 2 (as amended 1897). In 1939 the Constitution was amended to allow pari-mutuel wagering in horse races at legalized tracks. In 1947 New Jersey adopted a new Constitution, which, in Art. 4, §7, par. 2, prohibited all gambling, except for bingo games, lotto games and raffles held by certain charities, unless approved by the citizens in a general election.

In 1974 the voters of New Jersey rejected a referendum to allow legalized casino gambling throughout the State. In 1976 they approved a referendum to permit casinos only in Atlantic City, and thereby authorized adoption of the Casino Control Act. However, they did so only after they were promised that New Jersey would have the "strongest regulation of casinos in the world." *See, e.g., Strongest Law in World Offered for Atlantic City Casinos,* N.Y. Daily News, Oct. 1, 1976, at 40; *Lawmakers Reveal Casino Guidelines,* Newark Star Ledger, Oct. 1, 1976, at 1 (A66a).

Public hearings on the drafting of the Casino Control Act were held and numerous interested parties offered comments. *See, Public Hearing before the Assembly, State Government, Federal and Interstate Relations Committee of New Jersey Legislature on Assembly Bill No. 2366* (December 1976); *Public Hearing before the Senate Ju-*

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[12] Federal law imposes no general prohibition of gambling, although Congress has enacted legislation regulating certain interstate aspects of gambling, *see, e.g.,* 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); 18 U.S.C. §1084 (1976) (barring transmission of wagering information over interstate wires); 18 U.S.C. §§1301-1307 (1976 and Supp. V 1981) (regulating lotteries); 18 U.S.C. §1953 (1976 and Supp. V 1981) (barring interstate shipment of gambling paraphernalia). (A65a, n.15). However, these laws are designed to aid the states in the suppression of gambling activity which is contrary to state policy. *United States* v. *Fabrizio,* 385 U.S. 263 (1966).

diciary Committee of the New Jersey Legislature on Senate Bill No. 1780 (March 2, 1977). Reports were also submitted to the Governor and Legislature by various law enforcement entities. *See, Second Interim Report of the State Policy Group on Casino Gambling* (February 17, 1977); *Report and Recommendation on Casino Gambling by the Commission of Investigation of the State of New Jersey* (April 1977).[13]

The system of statutory and administrative controls which emerged has been described by the New Jersey Supreme Court as "extraordinarily pervasive and intensive," *Knight* v. *City of Margate,* 86 N.J. 374, 381, 431 A.2d 833, 836 (Sup. Ct. 1981), and as designed to regulate all aspects of the casino industry with the "utmost strictness." *Id.,* 86 N.J. at 392, 431 A.2d at 842; *Bally Manufacturing Corp.* v. *N.J. Casino Control Commission,* 85 N.J. 325, 426 A.2d 1000 (1981), appeal dism., 454 U.S. 804 (1981); *In re Martin, et al.,* 90 N.J. 295, 447 A.2d 1290 (Sup. Ct. 1982), *Uston* v. *Resorts International Hotel, Inc.,* 89 N.J. 163, 445 A.2d 370 (Sup. Ct. 1982).

When the Legislature promulgated the Casino Control Act it emphasized two principal points. First, the purposes of initiating casino gaming were: to enhance the tourist, resort, recreational and convention industry of the State; to restore, rehabilitate and redevelop Atlantic City; and to contribute generally to the economic structure, general welfare, health and prosperity of New Jersey. N.J. Stat. Ann. 5:12-1(b)(1)-(17) (West Supp. 1983).

Second, and more fundamentally, casinos, no matter how great their rewards, would only be acceptable if they were stringently regulated to preclude criminal infiltration or influence. Thus, the Casino Control Act demands maintenance of "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." N.J. Stat. Ann. 5:12-1(b)(6) (West Supp. 1983). Directly related to this purpose is the legislative declaration that "the regulatory provisions . . . are designed

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[13] These reports are part of the record in the District Court, which has been forwarded to this Court.

to extend strict State regulation to all persons . . . practices and associates related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Ibid.*

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness" to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. *Knight* v. *City of Margate, supra,* 86 N.J. at 392, 431 A.2d at 842. Obviously, the implementation of this public policy would be seriously deficient if it failed to extend to those labor unions which represent or seek to represent employees of the nine casino hotel facilities in Atlantic City.

Local 54 has asserted in the courts below that there has never been any finding that the Atlantic City casino industry is overwhelmed with corruption and crime. Aside from the fact that the casino industry is in its infancy and it is thus impossible for there to have been such a finding, it has long been recognized that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper influence. *Niglio* v. *New Jersey Racing Commission,* 158 N.J. Super. 182, 188, 385 A.2d 925, 928 (App. Div. 1978); *see also,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). The Federal Bureau of Investigation has long maintained that gambling is the "lifeblood of organized crime." *See,* Testimony of Frederich Fehl, Acting Asst. Dir., FBI, before the *Commission on the Review of the National Policy Toward Gambling,* Hearings in Washington, D.C., May 10, 1976 (App. A, 65a).

Casino gaming is unusually attractive to infiltration by organized crime, for two reasons:

> First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which

> are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are.

Santaniello, *Casino Gambling: The Elements of Effective Control,* 6 Seton Hall Legis. J. 23, 32 (1982) (footnote omitted).

Prior to the enactment of the Casino Control Act, the New Jersey State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra,* at p. III. The Commission of Investigation emphasized that only the "most stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." *Id.* at p. II.

Significantly, the Commission of Investigation noted that its experience regarding organized crime strongly suggested that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on the entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of illegitimate or illicit ventures.

Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra at 1-H.

Casinos are permitted in Atlantic City only in hotels with at least 500 sleeping rooms. N.J. Stat. Ann. 5:12-27

(West Supp. 1983). Investments of hundreds of millions of dollars are necessary to construct such hotels. Thus casino hotels, in addition to having the potential to generate hugh income, also operate under tremendous debt burdens. In addition, the casino business, within Atlantic City and among casino jurisdictions, is fiercely competitive. A labor union, such as Local 54, has the ability to bring a casino hotel, or all Atlantic City casino hotels, to a halt, or to threaten to do so. The potential for such a union to exact tribute, in dollars or in influence, in exchange for labor peace is obvious[14].

Accordingly, the State Commission of Investigation recommended taking steps to insure the integrity of labor unions affiliated with Atlantic City casino hotel facilities, *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra* at 1-H and 2-H, as did the Governor's Staff Policy Group, *Second Interim Report of the Governor's Staff Policy Group on Casino Gaming, supra* at 46. It is not surprising that the New Jersey Legislature heeded their advice. Regulation of the casino industry, which has traditionally been prohibited throughout the United States, and which has long been a magnet to organized crime, could hardly be expected to succeed if it ignored the industry's labor unions. Indeed, in enacting the Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 941, 18 U.S.C.A. §1961 *et seq.* (West Supp. 1981), in 1970

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[14] In recent testimony before the Senate Permanent Subcommittee on Investigations, the New Jersey Attorney General stated:

> Organized labor is in a prime position to exert tremendous pressure over the casino industry. . . . What would a casino owner pay for labor peace? How much is it worth to keep a business that grosses between $500,000 and $1 million a day free of a strike? A corrupt union could extort outright payments or use its power of persuasion to dictate what firms get the lucrative ancillary service contracts within the casino industry.

Quoted in *Court Delay Seen in Casino Dispute,* N.Y. Times, Oct. 10, 1982, at 55, col.1.

Congress also recognized the explosiveness of the combination of labor racketeering and gambling.[15]

In his dissent Judge Becker recognized that, unlike the New York-New Jersey waterfront, the Atlantic City casino industry has not been found to be overrun with crime and corruption, and responded:

> But to write into preemption jurisprudence a distinction between remedial and prophylactic legislation would prevent states from acting until an industry is so rife with corruption that "criminals, racketeers, and hoodlums [have] acquired a stranglehold," *Hazelton* v. *Murray*, 21 N.J. 115, 120, 121 A.2d 1, 4 (1956) (Brennan, J.) (describing condition of New York/New Jersey waterfront prior to compact and sustaining constitutionality of provision of New Jersey law identical to provision sustained in *DeVeau*). The inefficiency of such a distinction is manifest; to say that federal labor policy requires it would offend reason. [A74a-A75a].

Surely, the Supremacy Clause does not require New Jersey to wait until it worst fears are realized before it can act.

Local 54 contended in the courts below that there is no need for section 93 to apply to it, because its members are not directly involved in gaming operations, *i.e.*, they are not blackjack dealers, pit bosses, casino managers, *etc.* However, all of Local 54's members who work for casino hotels come within the licensure or registration provisions of the Casino Control Act, and are thus subject to the Commission's jurisdiction and the disqualification criteria

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[15] The recent decision of the National Labor Relations Board in *Marina Associates* v. *Casino Police and Security Officers, Local 2*, 267 N.L.R.B. No. 163 (1983), illustrates the problem of organized crime infiltration of the casino industry through labor organizations. Local 2 petitioned for certification as exclusive collective bargaining representative for the security guards at a Nevada casino. The Board upheld the ruling of the Regional Director, who dismissed the petition on the ground that Local 2 was not a labor organization within the meaning of section 2(5) of the NLRA, 29 U.S.C. §152(5) (1973), but rather was an organization operated by certain underworld figures for their personal profit.

of section 86 of the Act. N.J. Stat. Ann. 5:12-86 (West Supp. 1983). Moreover, Local 54 is the largest union operating in the Atlantic City casino industry, and its leaders wield a degree of influence which cannot be measured by the job specifications of its members. The dangers which section 93 is designed to protect against are clearly presented by Local 54.

Local 54 has also pointed out that some of its members work outside of the casino industry. Obviously, New Jersey has no interest in extending its system of casino regulation to persons who are not involved in the industry, and the section 93 prohibition of dues collection applies only to workers who are required to be licensed or registered under the Casino Control Act. In any event, the fact that the union's membership includes persons who do not work in casino hotels does not lessen the need to insure that it is not controlled by criminal elements. The danger to the casino industry remains present and it cannot be effectively negated if the State is unable to challenge the unfit leaders of the union because not every member is employed in a casino hotel.

Section 93 is an essential and integral part of New Jersey's overall effort to regulate its casino industry, and the policies embodied in section 93 cannot be characterized as anything less than deeply rooted in local feeling and responsibility. As Judge Becker put it (A72a),

> In sum, New Jersey's comprehensive regulation of the casino industry is a matter of intense and extraordinary local interest. Such regulation is not only essential to the State's struggle to maintain the integrity of the industry, but the very prospect of such comprehensive legislation was the basis upon which New Jersey's citizens consented to casino gambling in the first place. Given the unique nature of the industry—in particular its tremendous, unmonitored cash flow and its consequent attractiveness to racketeers and organized crime—the concerns of the legislature and citizenry cannot be characterized as anything less than "deeply rooted in local feeling and responsibility." *Local 926* v. *Jones*, supra, 103 S. Ct. at 1459.

Had the majority of the Court of Appeals considered the issue, surely it would have reached the same conclusion.

It is equally clear that section 93 does not represent a disruption of federal labor policy. Section 93 applies to a single, unique, local industry. In addition, as the Court ruled in *DeVeau* v. *Braisted, supra,* 363 U.S. 144, with respect to section 8 of the Waterfront Commission Act, section 93 does not contradict any federal labor enactment and can operate in harmony with federal labor policy. Like section 8 of the Waterfront Commission Act, section 93 does not deprive workers of the right to choose bargaining representatives, but merely restricts their right to choose insofar as necessary to protect the sensitive and vulnerable casino industry from pressure or control by convicted criminals and persons who conduct union affairs under the influence of organized crime. *Cf. DeVeau* v. *Braisted, supra,* 363 U.S. at 152. With respect to the disqualified individuals, section 93, again like section 8 of the Waterfront Commission Act, does not prevent them from serving in non-casino unions in Atlantic City, or in any unions outside of Atlantic City. It merely prevents corrupt union leaders from corrupting or feeding upon Atlantic City casinos. *Cf., International Longshoremen's Assoc.* v. *Waterfront Commission,* 642 F.2d 666, 672 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981).

The majority below correctly noted that the National Labor Relations Board has asserted jurisdiction over the casino industry (A34a-A35a). *El Dorado, Inc.,* 151 N.L.R.B. 579 (1965). However, as Judge Becker explained (A75a-A76a, n.26), the majority's implication that the NLRB's assertion of jurisdiction cannot be reconciled with state regulation under section 93 is incorrect, in view of the fact that the NLRB continues to exercise jurisdiction over the New York Waterfront despite the continuing validity of section 8 of the Waterfront Commission Act.

In addition, as Judge Becker also noted (A76a, n.26), the NLRB has shown a marked sensitivity to the fact that gambling activities are subject to strict state regulation, and a willingness to accommodate state interests in this

area. In asserting jurisdiction over the Nevada casino industry the Board said that it was "fully cognizant of the unique problems of enforcement existing in the gambling industry," and that its experience had been that there was no conflict between Nevada's regulation of its casinos and federal regulation of unions within the casino industry. The Board specifically said that there was no present or foreseeable conflict between "contractual tenure" rights of employees under collective bargaining agreements and the continuing qualification requirements imposed on those employees by Nevada's gaming regulations. On the contrary, the NLRB concluded: "It clearly appears that all parties have accommodated themselves successfully to the pattern of collective bargaining without any demonstrable adverse effect on supervision of gambling activities." *El Dorado, Inc., supra,* 15 N.L.R.B. at 583.

Thus, the Board has been able to reconcile the rights of employees under the NLRA and the state regulatory restrictions on those employees. The right of employees to elect representatives of their own choosing can likewise be reconciled with section 93 of the Casino Control Act. If section 93 is upheld by this Court, it will merely prohibit certain persons from holding union office, much in the same way section 504(a) of the LMRDA does, and will in no way impede the Board's ability to enforce legitimate collective bargaining rights.

The NLRB has also asserted jurisdiction over the Florida jai alai industry. *Volusia Jai Alai, Inc.,* 221 N.L.R.B. 1280 (1975). However, in so doing it noted Florida's extensive regulation of the industry, including a requirement that workers give 15 day's notice prior to any strike, but apparently did not preceive a conflict of state and federal regulations. *Id.* at 1282-1283. *See also, Florida Board of Business Regulation etc.* v. *NLRB,* 686 F.2d, 1362, 1365-1366 (11 Cir. 1982), upholding the NLRB's determination to assert jurisdiction over Florida's jai alai industry. There is no reason to anticipate that there will be any irresolvable conflict between the NLRB's jurisdiction over the Atlantic City casino industry and

New Jersey's implementation of section 93 of the Casino Control Act.[16]

In summary, when the deeply-rooted local concerns which motivated section 93 are viewed in light of its minimal effect upon federal labor policy, the constitutional validity of the statute is manifest.

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[16] It is also noteworthy that, in declining to exercise jurisdiction over the horse-racing and dog-racing industries, the NLRB again demonstrated its sensitivity to state regulation of gambling. The Board stated:

> In prior decisions, the Board declined to assert jurisdiction over these industries noting, *inter alia,* the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States' continuing interest in and supervision over the industries.

Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (1973) (codified at 29 C.F.R. §103.3 (1982)). Although the District Court ruled that this decision by the NLRB violated its statutory mandate, because it can only decline jurisdiction over industries not substantially affecting interstate commerce, *New York Racing Association* v. *NLRB,* 110 L.R.R.M. 3117 (E.D. N.Y. 1983), the District Court's decision was vacated on the ground that the District Court did not have jurisdiction to review the NLRB's decision. *New York Racing Ass'n* v. *NLRB,* 708 F. 2d 46 (2 Cir. 1983). An appeal has been filed with this Court. (Docket No. 83-120).

CONCLUSION

For the reasons herein stated, appellant New Jersey Casino Control Commission respectfully submits that this Court should reverse the judgment of the Court of Appeals insofar as it upheld the District Court's refusal to abstain from exercising jurisdiction, and should remand to the District Court for entry of an order dismissing the complaint. In the alternative, the Commission respectfully submits that this Court should rule that section 93 of the Casino Control Act is not preempted by federal law, and thus that the Court of Appeals erred in reversing the District Court's denial of the preliminary injunction. In the event that this Court determines not to resolve the ultimate issue of the validity of section 93, it is respectfully requested that the Court enunciate the proper preemption analysis as being a balancing of the relative federal and state interests and remand the matter for appropriate proceedings in accordance with that standard.

Respectfully submitted,

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Nos. 83-498 & 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

MARTIN DANZIGER, ACTING CHAIRMAN, THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY, *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

On Appeals from the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

This case involves the constitutionality of § 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. § 5:12-93 (West Supp. 1983-1984), which provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The questions presented are:

1. Should this Court direct dismissal under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, although (a) the New Jersey Attorney General seeks an "immediate adjudication" of the merits by this Court and (b) plaintiffs were unable to obtain a decision from a State tribunal prior to the effective date of the Casino Control Commission's order against them?

2. Is § 93 preempted by the National Labor Relations Act, because it undermines employee rights granted therein, and (insofar as it disqualifies unions from administering pension and benefit plans) by ERISA, because it "relates to any employee benefit plan" within the meaning of ERISA § 514(a)?

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BRIEF FOR APPELLEES[1]

STATEMENT OF THE CASE

1. *New Jersey's Regulation of Casino Gambling.*

The Court of Appeals succinctly outlined the state statutory scheme that is the subject matter of this case:

> In 1977 the New Jersey Legislature passed the Casino Control Act (the Act), which authorizes the licensing of hotels in Atlantic City for casino gambling. That act establishes a Casino Control Commission with broad regulatory authority over casinos and related industries. N.J.Stat. Ann. 5:12-63 to -75 (West Supp. 1982) It also establishes in the Department of Law and Public Safety, which the Attorney General heads, a Division of Gaming Enforcement, charged with responsibility for investigating all applicants for licenses, certificates, or permits, and prosecuting before the Commission or in the state criminal courts all proceedings for violation of the Act or regulations promulgated under it. N.J.Stat. Ann. 5:12-76 to -79 (West Supp. 1982). The Act requires licensing not only of casinos, but of casino key employees (supervisors), N.J.Stat. Ann. 5:12-89 (West Supp. 1982), and of casino employees. N.J.Stat. Ann. 5:12-90 (West Supp. 1982). Casino hotel employees include those performing "service or custodial duties not directly related to operations of the casino, including, without limitations, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." N.J.Stat. Ann. 5:12-8 (West Supp.

[1] Throughout this brief: "J.S. App." will refer to the Joint Appendix to the Jurisdictional Statements; "Dep't. Br." will refer to the brief for appellants G. Michael Brown, Director Department of Law and Public Safety, Division of Gaming Enforcement, *et al.*, in No. 83-498; "Comm'n. Br." will refer to the brief for appellants Danziger, *et al.*, in No. 83-573; and "Supp. App." will refer to the Supplemental Appendix of excerpts from the record separately filed herewith.

1982). For casino hotel employees the Act requires registration. N.J.Stat. Ann. 5:12-91 (West Supp. 1982). Section 86 of the Act lists criteria for the disqualification of casino licensees, and the section dealing with registration of casino hotel employees authorizes the Commission to revoke, suspend, limit or otherwise restrict the registration of any such employee who would be disqualified for a license. N.J.Stat. Ann. 5:12-86, -91(b) (West Supp. 1982). All industries offering goods or services to the casinos must also be licensed and are subject to the disqualification criteria of section 86. N.J.Stat. Ann. 5:12-92 (West Supp. 1982).

Particularly relevant to this case is the provision in section 93 of the Act, requiring that every labor organization seeking to represent employees licensed or registered under the Act and employed at a casino hotel register with the Commission annually. N.J.Stat. Ann. 5:12-93(a) (West Supp. 1982). Section 93 also provides:

> No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

N.J.Stat. Ann. 5:12-93(b) (West Supp. 1982). Thus section 93 cross-references to the disqualification criteria in section 86. [J.S. App. 5a-6a.]

Section 86 of the Casino Control Act referred to by the Court of Appeals sets out multiple "disqualification cri-

teria" of great breadth and generality, including the following which are central here:

* * * *

> b. *Failure of the* [*individual*] *to provide information, documentation and assurances* required by the act or *requested by the commission*, or failure of the [individual] to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;
>
> * * * *
>
> f. *The identification of the* [*individual*] *as* a career offender or a member of a career offender cartel or *an associate of a career offender* or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations; * * * [J.S. App. 248a, 254a; emphasis added.] [2]

2. ***Hotel and Restaurant Employees Local 54.***

Appellee, Hotel and Restaurant Employees and Bartenders International Union Local 54, is an unincorporated labor organization within the meaning of § 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(5). The Local's geographic jurisdiction, by virtue of its International Union charter, extends from Atlantic County, New Jersey up north to Ocean County and from Atlantic County west to Camden County.

Local 54 represents, and engages in collective bargaining on behalf of, approximately twelve thousand (12,000) employees, eight thousand (8,000) of whom are employed in casino hotels in Atlantic City, New Jersey. All of the Local's members employed in casino hotels work in traditional hotel and restaurant service related positions (*viz.*,

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[2] "Career offender," in turn, is defined in § 86(f) as "any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State."

as cooks, doormen, chambermaids, bartenders, and waitresses); none are employed in direct gaming positions (*viz.*, as dealers, cashiers, security personnel and the like).

Local 54, including its constituent predecessor locals, has represented hotel and restaurant service employees in Atlantic City and other locations within its jurisdiction since 1902. (Plaintiffs' Exhibit 9.) The Local's activities encompass the full scope of normal representational activity including, *inter alia*, contract negotiations, processing of employee grievances via contract grievance and arbitration procedures, and the maintenance of a hiring hall. (See Plaintiffs' Exhibits 6, 7 & 9.)

The same Local 54 business agents and employees who bargain collectively for, and provide representational services to, employees of casino hotels act on behalf of employees of non-casino establishments. The union hall, the hiring hall facilities and the staff of officers, business agents and employees essential to providing the full gamut of representational services provided to the Local's members are funded by a common pool of dues moneys collected from all of its members, again with no distinction between those who are employed in casino hotels and those who are employed elsewhere. (See Plaintiffs' Exhibits 6, 7 & 9.)

As a result of Local 54's collective bargaining efforts, its members also participate in the Hotel and Restaurant Employees and Bartenders International Union Welfare and Pension Funds and the Hotel and Restaurant Employees and Bartenders International Union Local 54 Severance Fund. (See Plaintiffs' Exhibits 5 & 8.) These are jointly administered employee benefit funds established pursuant to § 302 of the Taft-Hartley Act, 29 U.S.C. § 186, and regulated and administered pursuant to the terms of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (Plaintiffs' Exhibits 5 & 8.)

Appellee, Frank Gerace, is President of Local 54, and is a trustee to the International Welfare and Pension Funds. (See Plaintiffs' Exhibit 5.) Mr. Gerace and other officers of the Union also serve as trustees to the Severance Fund. (See Plaintiffs' Exhibit 8.)

3. *The Events Leading to This Case.*

When casino gambling in Atlantic City was made lawful, Local 54 was already the duly authorized collective bargaining agent for employees of those hotels which were converting to casino operations. In 1978, the Union and its officers, agents and employees filed the required registration statements.

In September 1980, Eugene M. Schwartz, Deputy Attorney General for the State of New Jersey assigned to the Department of Law and Public Safety's Division of Gaming Enforcement ("Division"), contacted counsel for Local 54 and demanded that Robert Lumio, then the Local's Secretary-Treasurer, appear at the Division offices to be questioned under oath by Division personnel without the presence of counsel and without assurances that Mr. Lumio could consult with counsel outside the examination room during the questioning. Mr. Schwartz additionally advised that the failure of Mr. Lumio to appear under these conditions "will be evaluated in accordance with the criteria delineated in the applicable provisions of the Casino Control Act and the Division will take whatever action is deemed appropriate." Supp. App. 1a-2a. Mr. Schwartz was advised that Mr. Lumio was hospitalized with leukemia and physically unable to appear for the requested interrogation. Further, the Division's demands concerning the conditions of its interrogation of Mr. Lumio were objected to and the Division was asked to provide the basis in law for the institution of such an inquisatorial system. *Id.* 3a-4a.

Over the next year and a half, there was an exchange of correspondence wherein representatives of the Division of Gaming Enforcement insisted that Mr. Lumio ap-

pear to be interrogated notwithstanding his hospitalization (which involved painful radiation and chemotherapy treatments),[3] and representatives of the Local, without securing a response, continued to request that the Division provide the basis in law for the Division's stated conditions with respect to the interrogation. Finally, in a letter dated February 1, 1981 the Division appeared to concede that Mr. Lumio was, in fact, seriously ill and, on that basis, to be willing to postpone his interview indefinitely.

The Division of Gaming Enforcement then, however, demanded that Frank Gerace, President of Local 54, appear for an interview under oath. Mr. Gerace responded by agreeing to appear with counsel at the Division's offices. Supp. App. 43a-44a. Thereafter, on March 16 1981, Mr. Gerace accompanied by counsel did appear at the Division's offices. Deputy Attorney General Kenneth J. Fortier, acting on behalf of the Division, as well as a police investigator for the Division and a stenographer were also present. Counsel affirmed on the record that Mr. Gerace was ready and willing to answer any question put to him under oath. Mr. Fortier, however, refused to ask any questions unless counsel left the room. An extensive dialogue on the record ensued wherein counsel reiterated that Mr. Gerace was ready, willing and able to answer any and all questions under oath but that counsel would not leave the room unless he was provided with the legal authority under which the Division was entitled to interrogate Mr. Gerace under its stated condi-

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[3] By letters dated December 15, 1980 and December 30, 1980, G. Michael Brown, the then Director of the Division of Gaming Enforcement, claimed that he had been advised by Mr. Lumio's attending physicians that Mr. Lumio was sufficiently recovered to appear at the demanded interview under oath. Supp. App. 15a-16a, 20a. Upon further investigation the attending physicians named by Mr. Brown in his letters specifically denied ever advising any agent of the Division that Mr. Lumio was, in fact, medically and physically capable of appearing to testify. See letters of January 16, 1981 and January 23, 1981, *id.* 26a-27a, 29a-30a.

tions. Mr. Fortier refused to cite any legal authority in support of the Division's position, refused to ask any questions and ultimately terminated the interview with the statement that Mr. Gerace had refused to cooperate and to respond to the Division's inquiries. See Supp. App. 45a-57a.

Immediately after the foregoing incident Mr. Fortier demanded that Mr. Lumio appear to be deposed. Supp. App. 58a. Mr. Fortier was advised that Mr. Lumio was again hospitalized. Supp. App. 59a-60a.

That demand was followed by a letter of complaint by the Division of Gaming Enforcement to the New Jersey Casino Control Commission alleging that Robert Lumio, Frank Gerace and other agents of Local 54 were not in compliance with various provisions of § 86 of the Casino Control Act. The Commission charged, *inter alia*, that Mr. Lumio and Mr. Gerace had failed to cooperate with the Division's investigations by refusing to participate in the aforesaid interviews. (Plaintiffs' Exhibit 2.)[4] Preliminary proceedings were held before the Commission and the Local raised the issues of federal preemption presented here. The Commission refused to consider those preemption arguments and entered a decision and order providing for further Commission proceedings. J.S. App. 7a.

4. The Proceedings in This Case.

In response to the Casino Control Commission's decision and order, Local 54 and Mr. Gerace filed a complaint in the United States District Court for the District of New Jersey alleging, *inter alia*, that § 93 of the Casino Control Act is preempted by the National Labor Relations Act, as amended ("NLRA"), and by the Employee Retirement Income Security Act of 1974 ("ERISA"), and moved for a preliminary injunction. An agreement was reached whereby all state proceedings would be held in abeyance pending the District Court's ruling on that

[4] Mr. Lumio died of pernicious leukemia in June 1981.

motion. On March 22, 1982, the District Court denied the motion for preliminary relief as premature.

Plaintiffs appealed to the United States Court of Appeals for the Third Circuit. While that appeal was pending the Casino Control Commission proceedings continued and on September 28, 1982, the Commission issued a decision and order finding three officers and agents of Local 54—Frank Gerace, Frank Materio, and Karlos LaSane—to be disqualified under § 86 of the Casino Control Act.[5] The Commission, pursuant to § 93(b) of that Act, thereupon barred Local 54 from collecting dues from employees of casino hotels, effective October 12, 1982, unless said officers and agents resigned or were removed from their union positions. The Commission further reserved its determination of whether to bar the Union from participating in the administration of employee benefit funds.[6] On October 12, 1982, the Commission issued a supplemental opinion holding that the additional prohibition in § 93(b) against the administration of pension and welfare funds by disqualified persons may be applied singly, or jointly with the bar on the collection of dues, at the Commission's discretion, and that the Commission would invoke additional sanctions if necessary.

On June 6, 1983, the Third Circuit held that § 93 of the Casino Control Act is preempted by the NLRA and by ERISA. J.S. App. 16a-33a. Accordingly, the Court declined to pass on plaintiffs' overbreadth and vagueness challenges to the Casino Control Act. *Id.* 37a.

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[5] As a result of Mr. Lumio's death, the issues concerning him were mooted and not litigated. Subsequent to the commencement of the Commission proceedings, the Division of Gaming Enforcement filed a second letter of complaint contesting the registrations of business agents, Karlos LaSane and Eli Kirkland. Kirkland was found not to be disqualified.

[6] As a result of the Commission's decision, on October 1, 1982, Appellees herein filed with the District Court a Motion for Injunctive Relief pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. The motion was granted on that date.

SUMMARY OF ARGUMENT

I. This is not a proper case for dismissal under *Younger v. Harris*, 401 U.S. 37. New Jersey's Attorney General stresses "the overwhelming importance of final resolution by this Court of the merits of the preemption issue." Dep't. Br. 14 n.6. Moreover, plaintiffs were not granted the "opportunity to raise and have timely decided by competent tribunal the federal issues involved," *Gibson v. Berryhill*, 411 U.S. 564, 577; the Commission's order would have gone into effect prior to such a determination but for the District Court's Rule 62(c) injunction.

II. A. (1) The Court of Appeals correctly decided that § 93 of the Casino Control Act is preempted insofar as it authorizes the Commission to disqualify bargaining representatives chosen by a union. *Hill v. Florida*, 325 U.S. 538, squarely held that the NLRA grants to the workers "full freedom of choice" in selecting their representative. "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualification." 325 U.S. at 541. See also *id.* at 545 (Stone, C.J. concurring).

(2) *Hill* held also "that while a State may require a union to register, it may not, as a sanction for noncompliance, enjoin the union from functioning as such." *Id.* at 543. Under this reasoning, New Jersey's sanction for noncompliance with § 93—a prohibition against collecting dues from casino employees—is independently preempted because it is "inconsistent with" the employees' § 7 rights and "the federally protected process of collective bargaining." *Id.* The § 7 right to "assist labor organizations" surely encompasses the right to finance them. Moreover, the 1947 "Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accom-

plish by collective bargaining will refuse to pay their share of the cost.'" *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416. New Jersey converts casino employees into involuntary free riders and compels the other members of Local 54 to pay all the union's expenses for collective bargaining or to relinquish their § 7 right to join with the casino employees in a single union.

B. Contrary to appellants, the authority of *Hill* is not diminished by *De Veau v. Braisted*, 363 U.S. 144, which rejected a preemption challenge to § 8 of the New York Waterfront Commission Act of 1953. *De Veau* rested on Congress' approval of the New York-New Jersey waterfront compact, and *Hill* was distinguished on that basis. *Id.* at 153-155 (plurality opinion); *id.* at 160-161 (Brennan, J. concurring).

C. *Bus Employees v. Wisconsin Board*, 340 U.S. 383, held that the NLRA preempts a State law which forbade any group of employees of a public utility from going out on strike, because it is contrary to § 7, which guarantees the right to strike. The law was not saved by the fact that it covered only the highly sensitive public utilities. "Creation of a special classification for public utilities is for Congress, not for this Court." *Id.* at 392-393. Compare § 8(e), (f) and (g) which treat specially with the industries designated therein. *Wisconsin Board* refutes appellants' principal point—that *Hill* is distinguishable because the Casino Control Act applies only to a single industry. In *Wisconsin Board* the Court also relied on the 1947 Congress' ratification of this Court's NLRA preemption decisions. The 1947 legislative history reveals that Congress was aware of *Hill*, and left it undisturbed while enacting a special anti-preemption provision (§ 14(b)) to authorize the States to outlaw union security clauses.

Appellants argue "that the NLRA should not preempt the Casino Control Act because crime control is a

"deeply rooted state interest" and thus subject to an exception to NLRA preemption. Appellants fail to heed that, as recognized in *Belknap v. Hale*, 51 L.W. 5079, 5081, this exception, which originated in *San Diego Unions v. Garmon*, 359 U.S. 236, 243-244, is applicable only to the *Garmon* branch of preemption doctrine, which is based on "*potential*" conflict with NLRA policy. *Id.* at 244. The exception has not been recognized in the substantive supercession branch of the doctrine, exemplified by *Wisconsin Board* and *Hill*, which preempts on the basis of *actual* conflict.

III. Insofar as it prohibits labor organizations to "administer any pension or welfare funds, if any officer * * * is disqualified in accordance with * * * Section 86," § 93(b) is preempted by ERISA. Section 514(a) of ERISA provides (with exceptions not claimed to be pertinent) that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. "Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw v. Delta Air Lines, Inc.*, 51 L.W. 4968, 4971. As the court below correctly ruled, "§ 93(b) cannot seriously be said not to relate to any employee benefit plan."

ARGUMENT

I. THIS IS NOT AN APPROPRIATE CASE FOR ABSTENTION UNDER *YOUNGER v. HARRIS*.

A. In this Court the Casino Control Commission urges reversal of the unanimous conclusion of the lower courts that the complaint herein should not be dismissed under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37. However, the Department of Law and Public Safety, in a brief signed by the Attorney General of New Jersey states that the appellants in No. 83-498 "do not press [the *Younger* defense] before this Court (a) because of

the overwhelming importance of final resolution by this Court of the merits of the preemption issue to New Jersey's ongoing regulation of casino activity; and (b) because we recognize that even had the lower federal courts exercised their discretion to abstain in favor of a preliminary determination of the substantive issue by the state courts, this Court would nonetheless remain the final arbiter." Dep't. Br. 14 n.6.[7] Under these circumstances, this Court's reasoning in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 is very much in point:

> *Younger* [and its progeny] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal.
>
> It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances *Younger* principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks. [431 U.S. at 479-480.]

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[7] The Department also says that if the Court "determine[s] to address the abstention issue, we urge that the position of appellant Casino Control Commission be adopted but not, of course, at the expense of leaving the question of preemption raised in this case unresolved." Dep't. Br. 14 n. 6. These two alternatives are, of course, mutually inconsistent, because if the Court were to direct abstention, in agreement with the Commission, there would be no opportunity to reach the merits of the preemption issue.

Here the State of New Jersey, speaking through its chief law enforcement officer, has stated unequivocally that the State seeks an "immediate adjudication" of the preemption issue by this Court. The Casino Commission has no interest in delaying that adjudication because its proceedings have been completed and therefore will not be interfered with by a decision here. Accordingly, we submit that as in *Hodory* "the *Younger* principles of equity and comity do not require this Court" to withhold a decision on the merits.

B. If the *Younger* issue is nonetheless reached, the Court of Appeals' conclusion that the District Court did not commit an abuse of discretion in refusing to abstain should be affirmed. We adopt the reasoning of the majority and partially concurring opinions in the court below (J.S. App. 35a-37a; 40a-42a n.3). We add only the following, which is, we submit, dispositive.

In *Gibson v. Berryhill*, 411 U.S. 564, 577, the Court declared that because *Younger* "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts, [this] course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." See also *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 437 (opinion of the Court), 438 (concurring opinion). The Casino Commission, while acknowledging this "prerequisite for a *Younger* dismissal," errs in stating that "Local 54 clearly has an adequate state forum in which to raise its federal issues." Comm'n. Br. 18.

The Commission's Order of September 28, 1982 directed that three named individuals "be removed as officers, agents or principal employees of [Local 54] by October 12, 1982" and that if any of these individuals "is an officer, agent or principal employee of Local 54 as of October 12, 1982, Local 54 will hereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by

a casino licensee or its agent." (J.S. App. 206a-207a.) This Order was entered after the Commission had refused to consider Local 54's federal claims (*id.* 7a), and of course the Commission's Order had not yet been reviewed by the state courts. As the Court of Appeals said, "Except for [the federal District Court's] injunction the Union would now be prohibited from collecting dues from its casino hotel members unless it replaced its President, its Business Agent, and a member of its Executive Board." (*Id.* 12a.) As that court also said:

> Had the order gone into effect, the Union would either have been deprived of the financial wherewithall to carry on its collective bargaining responsibilities or have deposed those duly elected officers whom the membership selected as their collective bargaining representatives. In neither case would it be possible, long after the event, to measure in money and compensate for the harm to the ongoing collective bargaining relationship from intangibles such as erosion of member's confidence in their chosen collective bargaining organization, delay in the process of grievances, or disruption of internal union affairs. [J.S. App. 33a-34a.]

Since this irreparable harm (which led the District Court to grant an injunction under F.R.Civ.P. Rule 62 (c)) would be suffered by appellees prior to obtaining a final resolution of their federal claims, even in the state forums, the state remedy is inadequate, and *Younger* abstention is inappropriate.

II. THE UNION OFFICIAL DISQUALIFICATION PROVISIONS OF NEW JERSEY LAW ARE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Court of Appeals held:

> Section 93 of the Casino Control Act is preempted by section 7 of the NLRA insofar as it purports to confer on the Commission authority to disqualify as bargaining representative the duly elected or selected

officials of a union certified by the Board as exclusive bargaining agent. [J.S. App. 31a.]

That court so held on the authority of *Hill v. Florida*, 325 U.S. 538, reasoning that *Hill* had decided that the National Labor Relations Act, as amended ("NLRA"), grants employees free choice concerning what individuals and what unions shall be their representative for purposes of collective bargaining and that no State may interfere with that federal right. We now show that the Court of Appeals correctly so held.

A. On the Authority of *Hill v. Florida*, the NLRA Preempts § 93 of the Casino Control Act.

1. (a) In 1943 Florida passed a statute providing for the licensing of union business agents and prohibiting the licensing of persons who had not been citizens for more than ten years, who had been convicted of a felony, or who were not of good moral character. At the instance of the Attorney General of Florida, that State's courts enjoined a union and a business agent from functioning as such until licenses under the statute were obtained. In *Hill*, this Court reversed. Because we submit, in agreement with the Court of Appeals, that this decision is "controlling" (J.S. App. 20a), we set forth at some length Justice Black's reasoning on behalf of the Court:

> It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. ***Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their***

guide. "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications.

Section 4 of the Florida Act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that § 4 limits a union's choice of such an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment.

Thus, the "full freedom" of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that § 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605.

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Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But, for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. *Cf. Western Union Co.* v. *Massachusetts*, 125 U.S. 530, 553, 554; *Kansas City Southern R. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75, 78; *St. Louis S.W. R. Co.* v. *Arkansas*, 235 U.S. 350, 368. This

> is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act. [325 U.S. at 541-543, emphasis added.]

In sum, the Court held that the Florida statute was repugnant to the NLRA in that the State law: 1) imposed limitations on who may act as a union business agent; and 2) disqualified the union from acting as a collective bargaining representative for not registering in compliance with the Florida statute.

Chief Justice Stone, in a separate opinion, concurred with the first of these holdings:

> [T]he National Labor Relations Act does not preclude a state from requiring a labor union, or its officers and agents, as such, to procure licenses or make reports or perform other duties which do not materially obstruct the exercise of rights conferred by the National Labor Relations Act or other federal legislation. * * * But it is quite another matter to say that a state may fix standards or qualifications for labor unions and their officers and agents which would preclude any of them from being chosen and from functioning as bargaining agents under § 7 of the National Labor Relations Act. The right conferred on employees to bargain collectively through a representative of their own choosing is the foundation of the National Labor Relations Act. Without that right, or if it were restricted by state action, the Act as drawn would have little scope for operation. [325 U.S. at 545.]

As the Court of Appeals recognized, "what New Jersey has done in Section 93" is "precisely" what Chief Justice Stone said a state may not do, consistent with § 7 of the NLRA: The State has "fix[ed] standards or qualifications for labor unions and their officers and agents which

would preclude any of them from being chosen and from functioning as bargaining agents under § 7 of the National Labor Relations Act." (J.S. App. 20a.)

(b) It bears noting that, contrary to appellants' depiction of their statute as disqualifying only those guilty of "criminal or *quasi*-criminal conduct," (Dep't. Br. 37), the statute in fact sweeps very broadly, and ambiguously, and will impact upon the rights protected by § 7 in a very obtrusive way. The litany of grounds for disqualification appearing in 5:12-86 would empower the Casino Control Commission to disqualify virtually anyone whose past conduct signified to the Commission a propensity to act inconsistently with the "policy of the Act," and the paramount policy of the Act is to promote tourism and thereby generate additional economic revenues for the state's citizens (5:12-1(b)(1), (2), (3), (4)). Since many activities protected by § 7 of the NLRA are inconsistent with the promotion of tourism (e.g. economic strikes that close hotels and casinos), the Act vests the Commission with power to disqualify virtually any union officer whose militancy is seen as a threat to tourism; the broad language of § 86 would render virtually every such officer vulnerable to a finding of disqualification.[8] And, of course, employers can be expected to take ad-

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[8] As shown at p. 3, *supra*, § 86(b) lists, as a ground for disqualification, noncooperations with the Commission; disqualification of two union officials was sought in this case because, although they had expressly indicated their willingness to answer all the Commission's questions, they had insisted upon the presence of their counsel, p. 7, *supra*.

Under the broad definition of "career offender" in § 86(f) (see p. 3 n.2, *supra*), a union official who has never in his life committed a wrong could be disqualified for numbering among his friends a person who has never even been charged, let alone convicted of committing a wrong, but is found by the Commission to be a "person whose behavior is pursued * * * for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State," and if the Commission arrives at a "reasonable belief" that the friendship is "inimical to * * * gaming operations."

vantage of the jeopardy thus posed to union officers, to obtain leverage against those who threaten to vigorously champion the interests of the employees they represent.

Congress, in enacting the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") specifically found on the basis of actual experience that disabling unions from performing their representational functions out of disapproval of the character of their officers is unsound.[9] Consequently, although § 504(a) of the LMRDA disqualified individuals who had been convicted of certain offenses from office and employment in labor organizations (and likewise disqualified members of the Communist party), these prohibitions were enforceable exclusively by criminal sanctions against the disqualified individuals. So too, the filing requirements established in §§ 201(a) and (b) were made enforceable by the criminal and civil sanctions of §§ 209 and 210, and §§ 9(f), (g) and (h) of the NLRA, which deprived noncomplying unions of the services of the NLRB, were *repealed* by § 201(d).

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[9] See Sen. Rep. No. 187 on S.1555, 80th Cong., 1st Sess. (1959) p. 9:

> To deny a union access to the National Labor Relations Board because its officers did not file a proper report is unwise for four reasons. First, it would be ineffective in the case of strong unions not dependent upon NLRB facilities; second, it is unfair to the members who have done no wrong but who would suffer both the denial of information and the loss of NLRB protection; third, the rights and duties created by the National Labor Relations Act exist for the benefit of the public, and such legal obligations should be enforced equally in all cases, not traded off against one another as a system of rewards and punishments; and, finally, experience with a similar provision in the present law clearly demonstrates that conditioning the use of the NLRB processes on compliance with not wholly related requirements such as this can result in a frustration of the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient, and expeditious manner. In short, the committee is convinced that such a procedure is costly, cumbersome, and of doubtful efficacy.

That the 1959 Congress determined that disqualification is an improper sanction is the exact point decided in *Alto Plastics Mfg. Corp.*, 136 NLRB 850:

> In titles I through VI of the Labor-Management Reporting and Disclosure Act of 1959, Congress expressly dealt with [internal union affairs.] It is particularly significant that the remedies provided in the LMRDA were given to individual employees directly, and to the public through the intervention of the Secretary of Labor or the Department of Justice. The theory underlying this type of remedial legislation is not to "illegalize" the organization itself, but to afford protection to all parties concerned by creating specific Federal rights and remedies whereby the activities of the organization and its officers and agents are regulated and subjected to judicial review in the vindication of those rights. Had Congress desired to strike directly at the organization itself, Congress would have said so. [136 NLRB at 853.][10]

The New Jersey statute, by making the union and its members suffer because of the State's disapproval of the union's officers, flies directly in the face of the national labor policy enunciated by Congress.

2. The second holding of *Hill*, which is buttressed, as we have just shown, by Congress' action in 1959, was that while a State may require a union to register, it may not, as a sanction for noncompliance, enjoin the union from functioning as such. That sanction, the Court held, is "inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. Under the same reasoning, the sanction proposed by § 93 of the Casino

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[10] *Alto Plastics* is correctly cited at Dep't. Br. 41 for the proposition that "[W]hat Section 93 does seek to accomplish, the removal of disqualified labor union officials, involves an area extraneous to the regulatory concerns of the Board." Since the State law is preempted here because that law is incompatible with the substantive protection of federal law and not because of any threat to the NLRB's primary jurisdiction, appellants gain nothing from that proposition.

Control Act against a union if an officer, agent or principal employee is disqualified under § 86, is also preempted by the NLRA. Section 7 declares the rights of employees, *inter alia*, to "form, join or assist labor organizations." The right to "assist" surely encompasses the right to finance such organizations. So too, by forbidding casino employes to pay dues to such a labor organization, New Jersey would forbid these employees from exercising their right to join, unless the union chose to waive that basic requirement, assuming that the union constitution even permitted such a waiver. Moreover:

> * * * Congress' decision to allow union-security agreements * * * reflects its concern, that at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them. Again, the focus of this concern is *not* the hiring process, but rather the benefits to be derived from union representation during the period of employment—while the employee is on the job. Thus, the Senate Committee Report on what became the Taft-Hartley Act observed that § 8(a)(3) gives "employers and unions who feel that [union-security] agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. Rep. No. 105, 80th Cong., 1st Sess., 7 (1947). 1 Leg. Hist. 413. "Congress recognized that in the absence of a union-security provision 'many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.' S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L.M.R.A. 412." *NLRB* v. *General Motors Corp.*, [373 U.S. 734] at 740-741. [*Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416, emphasis in original.]

By prohibiting employees of casino hotels from paying dues to a union which retains a disqualified officer or agent, the Act converts these individuals into involuntary free riders. Conversely, it compels those members of Lo-

cal 54 who are not employed by casinos (about 15% of the members, see p. 23 n.11, *infra*) to pay for all the representation and other expenses of the union or relinquish their § 7 right to join with the casino hotel employees in a single union for collective bargaining. Section 14(b) of the NLRA, which authorizes the States to forbid agreements that require the payment of union dues, most assuredly does not authorize the states to make *nonpayment* compulsory. On the contrary, the § 8(a)(3) proviso and § 14(b) represent a thoroughly considered compromise between the financial needs of unions and employees' freedom of choice, with the States being afforded the authority to prefer the latter interest. New Jersey's anti-dues sanction, however, undermines both of the values which Congress balanced and is therefore wholly inconsistent with the NLRA.

One of the appellants' briefs asserts "that a sanction for failure to file which directly prohibits a union from engaging in collective bargaining will be precluded by the operation of federal law, *Hill*, *supra*, 325 U.S. at 543, but that a penalty such as a ban on dues collection will not be so excluded. [*Alabama State Federation of Labor v.*] *McAdory*, 325 U.S. [450] at 466." Dep't. Br. 34. The passage from *McAdory* on which appellants rely does not state that "a ban on dues collection" will be permissible even if this would seriously undermine the union's functioning as a bargaining representative of employees covered by the NLRA. And it should be sufficient to dispel appellants' reading of *McAdory* that when this same sanction was challenged in *DeVeau v. Braisted*, 363 U.S. 144, Justice Frankfurter's plurality opinion distinguished *Hill* on other grounds (see p. 25 to 26, *infra*), but did not so much as hint that *McAdory* had decided the point. "Reading *Hill* and *McAdory* together" (Dep't. Br. 34) as appellants would, attributes to Congress the self-defeating intention of allowing a state to do by indirection that which *Hill* held it may not do directly. To be sure, in the passage quoted by appellants the Court

said, "we cannot *assume* that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file." 325 U.S. at 466 (emphasis added). But those very words show that the *McAdory* Court did not pass on the legality of a ban in a case such as that here where such a showing is made, since in the immediately succeeding sentence the Court carefully reserved the "question * * * of a statute which has been construed to operate either by its penal sanctions, or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for non-compliance with § 7." *Id.* In contrast with *McAdory*, the present record contains abundant uncontradicted evidence that Local 54 could not perform its functions as bargaining representative without collecting dues from casino hotel employees.[11] For example, griev-

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[11] Anna Mary Bitmire, Local 54's office manager, swore in an affidavit submitted in the District Court:

> The total monthly budget for the operation of all of Local 54's services including the required per capita payment to the International Union [$33,000] is approximately $120,000 a month. The sole income received by Local 54 comes from union dues and initiation fees, in which the total amount, consisting primarily of dues, is approximately $130,000 a month, of which approximately 85% comes from the membership dues paid by members employed in the casino hotels.
>
> * * * *
>
> In the event of a cessation of dues income to Local 54 from the hotel casinos, it will be impossible to maintain the union hall, to service the union membership either in the casino hotels or in the non casino hotel areas, and as a result the collective bargaining agreements will not be enforceable. The monies and income of Local 54 are extended solely for the salaries and benefits payable to those persons who provide the services to the membership, and to all of the expenses necessary in order to administer collective bargaining agreements, bargain for new collective bargaining agreements, organize the unorganized, process grievances, and perform the other responsibilities of a collective bargaining agent. [Appendix for Appellants in the Court of Appeals 318a-319a.]

ance adjustment, a major union function in "the federally protected process of collective bargaining" (*Hill*, 325 U.S. at 543) could not be conducted by Local 54 without the receipt of dues.[12]

B. *Hill v. Florida* Is the Governing Precedent Herein.

Appellants contend that the authority of *Hill* has been eroded by this Court's subsequent decision in *DeVeau v. Braisted*, 363 U.S. 144 ("*DeVeau*"), and by subsequent Congressional action. We now show that the Court of Appeals correctly rejected this contention because *DeVeau* rests on Congress' authorization of the Waterfront Commission Compact.

1. We adopt the Court of Appeals' description and analysis of *DeVeau*:

> *DeVeau* involved a challenge on preemption grounds to the constitutionality of section 8 of the New York Waterfront Commission Act of 1953, which disqualified from office in any waterfront labor organization convicted felons who had not been pardoned. The New York legislation and companion legislation in New Jersey were adopted pursuant to an

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[12] Carolyn M. Bishop, a grievance hearing coordinator for Local 54, swore in an affidavit submitted in the District Court:

> Deponent and her co-employee, Mary Anne Garrity, as well as all of the business agents and all of the officers and other representatives who perform the services of the grievance procedure are full time employees of the union who depend upon wages and fringe benefits for their daily livelihoods which wages and fringe benefits are derived solely from the union dues paid by members to Local 54. In addition, the costs of the impartial arbitrators, the costs of the attorneys required to represent the union in the grievance and arbitration procedure and all related costs are borne solely by the union treasury, which is made up completely of income derived through the payment of union dues. In the event of a cessation of dues income, there would be no means to continue the representation as aforementioned, and there would be a denial to thousands of employees of protection against unjust discharge, los[s] of seniority rights, fringe benefits, employment opportunities, and the other rights secured by the contract. [*Id.* at 243a.]

interstate compact between those states. The compact was submitted to Congress, as required by article I, section 10 of the Constitution, and after hearings in both the House and Senate was approved. Nevertheless a disqualified union officer contended that the state statute was preempted by sections 1 and 7 of the NLRA. Justice Frankfurter rejected that contention, observing:

> In light of the purpose, scope and background of this New York legislation and Congress' relation to it, such an inference of incompatibility has no foundation. In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation. Here the States presented their legislative program to cope with an urgent local problem to the Congress, and the Congress unambiguously supported what is the core of this reform. Had § 3 [of the New York law] been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

363 U.S. at 153. He also rejected the contention that the enactment of the LMRDA, subsequent to congressional approval of the compact, vitiated prior approval. Frankfurter's opinion did not command a majority, but even in speaking for himself and the three justices who joined in it he was careful not to intimate that *Hill* v. *Florida* was overruled. The absence of any such suggestion is significant since Frankfurter had dissented in *Hill* v. *Florida*, 325 U.S. at 547. Obviously he was unable in *DeVeau* to find support for the adoption of his dissenting position. Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on congressional intent in approving the compact. 363 U.S. at 162. The dissenting justices, who noted that the justices in the majority were not overruling *Hill* v. *Florida*, disagreed only about the proper construction of the compact. 363 U.S. at 161,

163. (Douglas, J., dissenting). The *DeVeau* case cannot, therefore, be read as impairing the authority of *Hill* v. *Florida*. [J.S. App. 28a-29a.]

2. Appellants point to language in Justice Frankfurter's opinion in *DeVeau* which, in its approach to the question of preemption is reminiscent of his dissents in *Hill* and in *Bus Employees v. Wisconsin Board*, 340 U.S. 383. But this language did not commend itself to a majority of the Court and does not appear to have been a necessary part of the plurality's analysis. For the plurality opinion, and Justice Brennan's concurring statement, both belie the assertion of one of the appellants that "*DeVeau* did not pivot on the existence of the compact." Comm'n. Br. 33. Immediately after the passage quoted by the Court of Appeals, the *DeVeau* plurality opinion devoted two additional paragraphs to Congress' consideration of the compact (363 U.S. at 153-154), and then concluded its discussion of the NLRA-preemption issue by distinguishing *Hill* precisely on the basis of Congress' approval of § 8 of the New York Waterfront Commission Act:

> The sum of these considerations is that it would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in § 8. The decision in *Hill* v. *Florida*, 325 U.S. 538, in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill* v. *Florida*, as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry. [363 U.S. at 154-155.]

And Justice Brennan, in providing the fifth vote for affirmance, stated his "opinion that Congress has demonstrated its intent that § 8 of the New York Waterfront

Commission Act should stand despite the provisions of the National Labor Relations Act." 363 U.S. at 160.[13]

3. In *DeVeau* it was contended also that § 8 of the Waterfront Commission Act was preempted by § 504(a) of the LMRDA, which prohibits persons who have been convicted of the crimes defined therein from holding union office. The Court rejected that contention, and we entirely agree, that "Section 504 * * * does not preempt the states from establishing more stringent standards where justified by a compelling local interest." Dep't. Br. 24. Indeed, we think it is clear that § 504 does not so preempt, whether or not a compelling local interest is shown. But the Court of Appeals did not rely on any preemptive effect of the LMRDA; nor do we. It suffices that the Casino Control Act is preempted *by the NLRA* (and, with respect to the pension and welfare plan disqualification discussed in Point III, *infra*, by ERISA). In contesting an LMRDA preemption claim not advanced appellants demolish a straw man.

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[13] In asserting that Justice Brennan's conclusion that § 8 of the Waterfront Compact was not preempted by the NLRA did not rest on Congress' approval of the Compact, the Commission's brief not only ignores the above-quoted passage, which addressed that issue, but distorts by a critical omission the portion of his statement which that brief does quote. The second sentence of Justice Brennan's statement reads as follows: "He believes that New York's disqualification of ex-felons from waterfront union office, on all the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate state aim, *and does not deny due process or otherwise violate the Federal Constitution.*" 363 U.S. at 161, emphasis added to show the portion elided from the quotation at Comm'n. Br. 33. It will be recalled that the appellants in *DeVeau* had argued that § 8 of the Compact violates the Due Process Clause of the Fourteenth Amendment and the constitutional prohibitions against Bills of Attainder and *ex post facto* laws. See 363 U.S. at 157-160 (plurality opinion).

The two lower court decisions cited at Dep't. Br. 46-47 for the proposition that the *DeVeau* analysis should be employed on the ERISA-preemption issue recognize that *DeVeau* was predicated on Congress' approval of the Compact. See the portions of those opinions quoted at pp. 48-49 nn.32-33, *infra*.

4. Before leaving *DeVeau*, it is worth noting the differences between the statute now before this Court and the compact in *DeVeau*. The statute here is of course far more sweeping in its application: the New York Waterfront Act banned only convicted felons (363 U.S. at 145) while, as noted *supra*, p. 3 and n.2, the New Jersey statute would disqualify broad categories of persons who have never committed a crime (let alone been charged with one), and without a finding that they are likely to do anything in the future more odious than behave inconsistently with the State's interest in promoting tourism. Of equal importance, the Waterfront Compact was adopted to address a demonstrated problem of entrenched corruption—a reality that was deemed critically important in this Court's opinion. New Jersey, by contrast, has enacted far more sweeping legislation without a demonstrated basis to fear evils attributable to unions. In this respect, the two reports to the New Jersey legislature that were the foundation of the statute are illuminating. Staff Policy Group on Casino Gambling, Second Interim Report (Feb. 17, 1977) [hereinafter "Staff Report"]; Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey (Apr. 1977) [hereinafter "Comm'n Report"]. On the basis of experience in other jurisdictions the reports were able to detail with great specificity the means for avoiding corruption attributable to the actions of casino owners, operators, employees and suppliers. (Staff Report at 1-3, 10-14, 21-28, 34-36; Comm'n Report Parts B, C, D, E, F and G.) But each report contained only a single paragraph *speculating* on the ways that unions might be a source of evil, and the particular dangers hypothesized do not rationally explain, let alone justify, the broad prohibitions that are the subject of this lawsuit.

(i) The Commission report declared (at p. 1-H): "[T]he ready source of cash which union coffers provide can be employed as a financing of all sorts of legitimate

or illegitimate ventures." There are, of course, myriad ways that the state could protect against this investment danger—even if the belief in the amplitude of "union coffers" were better founded—without crippling unions in the performance of their federally-protected representational functions; most obviously, the State could absolutely forbid the investment of any union monies in casino operations (compare § 5:12-93(c)). And the hypothesized danger simply has no nexus to the disqualification provisions at issue here. "Union coffers" would be as readily available for "financing . . . ventures" whether or not the unions are allowed to represent employees in casino hotels.

(ii) The only other rationale offered in the reports was that unions, if corruptly run, might use the threat of strikes to extort monies from casino operators. (Comm'n Report, p. 1-H; Staff Report, p. 46). That hypothesized danger, which would appear equally applicable to any industry, surely can be (and indeed is) guarded against by means less intrusive of federal interests. Extortion by union officials is already both a federal and state crime. Those against whom the extortion would be practiced—the casino hotel owners—are persons whose integrity must have been affirmatively established as a precondition to their securing operating licenses (§§ 80-88), and who therefore can be trusted to report (indeed, are obliged by the statute to report (§ 80(g)) any such attempt. Thus, even if there had been experience elsewhere to suggest a danger of attempted union extortion of casino operators (and none was cited in the reports), there are ample safeguards in New Jersey law to prevent that occurrence without crippling the bargaining representation function.[14] There is, in sum, nothing here

[14] It is also noteworthy that Nevada, which states at p. 9 of its brief *amicus* that it has had legalized controlled casino gambling since 1931, but did not regulate unions until 1979 (*id.* 16-17), recites no experience with the evils which the New Jersey reports fear.

that approximates the legislative record upon which the compact in *DeVeau* was founded.

C. *Bus Employees v. Wisconsin Board* Confirms the Preemptive Effect of the NLRA.

1. The heart of appellants' theory is that the challenged provisions of the Casino Control Act should be sustained because those provisions are limited to a single sensitive state industry—casino gambling. As the Court of Appeals recognized: "Essentially the same argument was rejected when as a reason for avoiding federal preemption, states asserted their deep interest in the operation of state franchised public utilities." (J.S. App. 30, citing *Bus Employees v. Wisconsin Board*, 340 U.S. 383 ("*Wisconsin Board*").)

In *Wisconsin Board*, this Court struck down the Wisconsin Public Utilities Anti-Strike Law which, *inter alia*, made it unlawful for any group of employees of a public utility employer to go out on strike. See *id.* at 387. Adverting to its decision, at the previous Term, in *Automobile Workers v. O'Brien*, 339 U.S. 454, the Court said:

> We noted [in *O'Brien*] that Congress in § 7 of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, expressly safeguarded for employees in such industries the "right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection, e.g., to strike." We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike. * * * Upon review of these federal legislative provisions, we held, 339 U.S. at 457:
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> > "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. *Plankington Packing Co. v. Wisconsin Board*, 338 U.S. 953 (1950); *LaCrosse Telephone Corp.*

> *v. Wisconsin Board*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767 (1947); *Hill v. Florida*, 325 U.S. 538 (1945)." [340 U.S. at 389-390, footnotes omitted.]

In reaching this result, the *Wisconsin Board* Court rejected the proffered distinction "that the industry to which Michigan applied its notice and strike-vote provisions [in *O'Brien*] was a national manufacturing organization rather than a local public utility." 340 U.S. at 391. The Court observed that Congress had regulated labor relations to the full extent of its constitutional power under the Commerce Clause, that public utilities are subject to the commerce power and that Congress had, in 1947, rejected separate treatment for public utilities. *Id.* at 391-392. "Creation of a special classification for public utilities is for Congress, not for this Court." *Id.* at 392-393.

In a dissenting opinion for three members of the Court, Justice Frankfurter recalled that public utilities had long been especially subject to regulation, in their labor relations and otherwise, and observed that, "stoppage in utility service so clearly involves the needs of a community as to evoke instinctively the power of government." 340 U.S. at 405. He thereupon urged that the

> Court should not ignore history and economic facts in construing federal legislation that comes within the area of interacting State and federal control. To derive from the general language of the federal act a "right" to strike in violation of a State law regulating public utilities is to strip from words the limits inherent in their context. [340 U.S. at 405.]

Despite these historic and economic considerations, not present herein, the Court refused to limit the rights guaranteed by the NLRA to employees of public utilities. *Wisconsin Board*'s holding applies with at least equal force to appellants' prayer for special treatment of New Jersey's casino gambling industry. When Congress wishes

to exclude an industry from the coverage of the NLRA, or to give an industry special treatment, the legislature knows how to do so. In 1947, Congress, for example, amended § 2(2) of the NLRA to exclude nonprofit hospitals from the definition of "employer"; the health care amendments of 1974 [15] eliminated that exclusion, but added § 8(g), which establishes a special 10-day notice requirement prior to any strike, picketing, or other concerted refusal to work at any "health care institution" (profit or nonprofit), as defined in a new § 2(14). So, too, under the 1959 amendments to the NLRA there are separate provisos to § 8(e) dealing respectively with the apparel and clothing and building and construction industries; the latter is also separately dealt with in § 8(f). Moreover, when *Wisconsin Board* was unanimously reaffirmed in *Bus Employees v. Missouri*, 374 U.S. 74, the Court observed: "It is hardly necessary to add that nothing we have said even remotely affects the rights of a State to own or operate a public utility or any other business * * *" (*id.* at 83). The availability of this choice was stressed by the Court of Appeals, which noted that "New Jersey has exercised that option with respect to its lottery." (J.S. App. 30a.) The Court of Appeals added:

> Congress has not, however, given the states the further option of deciding for themselves which areas of private enterprise can be so cloaked with the mantle of state interest as to be placed outside the preemptive scope of section 7 of the NLRA. The state argues that it should have that option at least for the gambling industry, because that industry is uniquely attractive to unwholesome elements in our society. Recognition of such a doctrine, however, could not be confined to the gambling industry. Other industries in which the state is vitally interested have also been identified as susceptible of infiltration by organized crime. The problem of organized crime is a national one, which Congress has

[15] Pub. L. 93-360, 88 Stat. 395.

> addressed both in criminal statutes, *e.g.*, 18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980), and by permitting general state criminal law to operate against labor union officials. 29 U.S.C. § 524 (1976). That problem cannot be relied upon by the states to Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce. [J.S. App. 30a-31a, footnote omitted.]

Appellants cannot differentiate the present case from *Wisconsin Board*. Their briefs simply ignore that precedent, despite the Court of Appeals' strong reliance thereon in rejecting appellants' principal point—that *Hill* is distinguishable because the Casino Control Act applies only to a single industry.[16]

2. The *Wisconsin Board* decision relied in part on the 1947 Congress' ratification of the NLRA preemption principles which had been established by this Court:

> When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board*, 330 U.S. 767 (1947), and, in its handling of the problems presented by that case. Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation "preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and de-

[16] The Department brief does not mention *Wisconsin Board* at all, and the Commission brief does so only in connection with the abstention issue. Comm'n. Br. 23.

> clare invalid state regulation which impinges on that legislation. [340 U.S. at 397-398, footnotes omitted.]

Likewise, in the present case the Court of Appeals has comprehensively demonstrated that Congress ratified the *Hill* decision in amending the NLRA in 1947 and 1959. See J.S. App. 21a to 27a, to which we respectfully call this Court's attention. We therefore add only two points to the Court of Appeals' discussion.

(a) In the passage from *Wisconsin Board* just set forth, this Court quoted the report of the House Committee on Education and Labor on what became § 14(b) of the NLRA as amended in 1947.[17] The Senate Committee Report on the parallel provision in the Senate bill states:

> Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A.F. of L. v. Watson*, 327 U.S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill v. Florida*, 325 U.S. 538; see also *Bethlehem Steel Co. v. N.Y. Labor Board*, decided by the Supreme Court April 7, 1947).[18]

Thus, Congress enacted § 14(b), an anti-preemption provision, in recognition of this Court's NLRA preemption decisions. Section 14(b), like § 10(a) (which, as *Wisconsin Board* noted, was enacted in response to the *Bethlehem Steel* decision) represents both Congress' acceptance of the general preemption rule, and Congress' modification of that rule with respect to those specific subjects where Congress has thought modification appropriate.[19]

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[17] 340 U.S. at 398 text and note at n. 24, citing H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) p. 44.

[18] Sen. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) p. 6.

[19] The suggestion that the 1953 Congress in approving the Waterfront Compact determined that in general state laws providing for the removal of union officers do not interfere with rights under the NLRA as amended in 1947 (Comm'n. Br. 32), is even less plausible

(b) Appellants argue, too, that by enacting § 504(a) of the LMRDA of 1959, which prohibits persons convicted of certain crimes from holding union office, Congress tacitly approved state imposition of more stringent qualifications.[20] The opinion in *Wisconsin Board* shows

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than is usual when inferences as to the meaning of a federal law are sought to be drawn from the views of a post-enactment Congress. The Waterfront Compact is not *in pari materia* with the NLRA. Indeed, the legislation approving the Compact was considered by the Senate Committee on Interstate and Foreign Commerce and by the House Judiciary Committee, neither of which is responsible for labor legislation. Finally, the provision of the Compact which disclaims interference with any rights under federal law, like all others, was drafted by the contracting states, and in accord with normal procedures was considered as a whole that Congress would approve or disapprove as submitted. See Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st Sess., on H.R. 6286 *et al.*, p. 156. Neither the committee reports nor the debates refer to this provision, let alone contain any statement that the disqualification of persons from union office does not interfere with employees' § 7 rights.

[20] In *DeVeau* both the plurality opinion and Justice Brennan's concurring statement relied on anti-preemption provisions in the LMRDA which have no counterpart in the NLRA. See 363 U.S. at 156-157, 160-161. In rejecting the contention that § 504(a) "impliedly barred" any different state disablement provision, Justice Frankfurter, for the *DeVeau* plurality, pointed to "the 1959 Act [LMRDA] which reflects congressional awareness of the problems of preemption in the area of labor legislation, and which did not leave the solution of questions of preemption to inference" (363 U.S. at 156), and contrasted § 504(a) with other provisions of the LMRDA which expressly exclude the operation of state law. Justice Frankfurter cited two sections of that 1959 Act "[which] affirmatively preserve the operation of state law". *Id.* The provisions thus referred to, §§ 603(a) and 604, each provide that "nothing in this Act" shall have a preemptive effect. The more important of these, § 603(a), is, as Justice Frankfurter wrote, "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act." 363 U.S. at 157. That section provides,

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor

that this inference from the enactment of § 504 is entirely unwarranted.

The supporters of the Wisconsin statute argued, and the dissenting opinion agreed, that the limitations on national emergency strikes in Title II of the 1947 Act demonstrate that "the principle of hands-off collective bargaining is no more absolute than the right to strike" and "imply that the States retain the power to protect the public interest in emergencies economically and practically confined within a State." 340 U.S. at 405, 407. The Court, however, squarely held to the contrary.

> In any event congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. *Automobile Workers* v. *O'Brien*, *supra*, at 457. And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the

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organization or any officer, agent, shop steward, or other representative of a labor organization * * * under the laws of any State * * *.

Justice Brennan, in turn, concurred in this portion of *DeVeau* on the basis "that the Labor-Management Reporting and Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." 363 U.S. at 160-161.

As the foregoing portions of *DeVeau* make clear, while § 504(a) of the LMRDA does not, of its own force, expressly or impliedly preempt any state law, that section also does *not*, expressly or impliedly, authorize any State law which is preempted by some *other* federal law. Indeed, as the Court of Appeals explained, the entire LMRDA, which included amendments to the NLRA, reflects approval of this Court's NLRA-preemption decisions, with a single exception not pertinent here—the enactment of § 14(c) of the NLRA, which significantly modifies *Guss v. Utah Labor Board*, 353 U.S. 1.

state legislation is in conflict with federal law. [340 U.S. at 394.] [21]

3. Appellants also argue that the NLRA should not preempt the Casino Control Act because crime control—the object of the provisions here at issue—is a "deeply rooted state interest" and thus subject to an exception to NLRA preemption doctrine. Dep't. Br. 15-18; Comm'n. Br. 35-

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[21] In *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, the Court again considered and rejected an anti-preemption argument similar to that based on § 504(a) that appellants make here. The question there was whether §§ 7 and 13 of the NLRA precluded a state from enjoining recognition picketing by a union which was not eligible for Board certification because of noncompliance with the filing requirements of §§ 9(f), (g) and (h) of the NLRA as it then stood. In a lone dissenting opinion, Justice Frankfurter argued against preemption. In his view, the fact that Congress had denied an important benefit to a noncomplying union rendered it unlikely that "Congress had impliedly withdrawn from the States the power to regulate such a union." 351 U.S. at 78. He added:

> So far as its own law-enforcement machinery for protecting the interests of employees is concerned, Congress designed to hamper non-conforming unions and to discriminate against them by denying them rights deemed of the utmost importance to trade unions. This being so, I find it rather difficult to conclude that, while visiting such consequences upon a non-conforming union in the federal domain of law enforcement, the Congress has impliedly withdrawn from the States the power to regulate such a union. [351 U.S. at 78.]

This reasoning parallels the present appellants' argument that because Congress has, in § 504(a) of the LMRDA, outlawed persons convicted of certain crimes from holding union office, Congress impliedly approved a similar (although more stringent) regulation by the States.

The Court, however, *rejected* this approach and held that the union's right under §§ 7 and 13 to engage in peaceful picketing and to strike was not lost because of its noncompliance:

> Subsections (f), (g) and (h) of § 9 merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance. [351 U.S. at 73.]

37. This argument rests entirely on a failure to heed the distinction in preemption analysis Justice Harlan explained with characteristic precision:

> For example, in referring to decisions holding state laws preempted by the NLRA care must be taken to distinguish preemption based on federal protection of the conduct in question; *e.g., Teamsters v. Oliver*, 358 U.S. 283 (1959); *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951) from that based predominantly on the primary jurisdiction of the National Labor Relations Board, *e.g., San Diego Union v. Garmon*, 359 U.S. 236 (1959), although the two are often not easily separable. [*Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 n.19 (*"Trainmen"*).]

In the first of these categories—substantive supercession—this Court has never balanced the federal and state interests. Rather, the "deeply rooted state interest" exception to preemption originated in *San Diego Union v. Garmon*, 359 U.S. 236, 243-244, and has been followed exclusively in the second branch of the preemption doctrine identified by Justice Harlan in *Trainmen*. Last Term's decision in *Belknap v. Hale*, —— U.S. ——, 51 L.W. 5079, makes this clear:

> Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. *Id.*, at 245. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.*, at 243-244, *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 200 (1978), *Farmer v. Carpenters*, 430 U.S. 290, 296-297 (1977). In such cases, the state's interest in con-

> trolling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate controversies committed to it by the Act, *Farmer v. Carpenters, supra*, at 297, *Sears, Roebuck & Co. v. Carpenters, supra*, 436 U.S. at 200, and the risk that the state will sanction conduct that the Act protects. *Id.*, at 205. The second preemption doctrine, set out it *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, *id.*, at 140, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes, *id.*, at 147-148. [51 L.W. at 5081.] [22]

Indeed, *Belknap* applied the "deeply rooted state interest" test only in the *Garmon* portion of the opinion, see p. 40 n.23, *infra*, and each of the cases appellants cite on this point is in the *Garmon* line.

By contrast, the present case involves the first of Justice Harlan's categories—"pre-emption based on federal protection of the conduct in question." *Hill* was decided long before *Garmon*, said nothing about the primary jurisdiction of the NLRB, and rests squarely on the proposition that the states may not interfere with the employees' right, protected by the NLRA, to select their bargaining representatives. See Part IIA, *supra*. In this category of cases, where it is asserted that a State has interfered with the exercise of rights granted by the NLRA, this Court has not inquired as to the importance to the state of its challenged law.

---

[22] *Belknap* and *Machinists v. Wisc. Emp. Rel. Comm'n.*, 427 U.S. 132, 138-141 (which recognized the same distinction between the two NLRA preemption doctrines discussed in the text), address only one important class of substantive supercession cases—those which involve the use of economic weapons by parties in a labor dispute, the immediate context of *Belknap* and *Machinists*. But this does not bespeak disagreement with the more general *Trainmen* analysis, which was quoted approvingly in *Machinists*, 427 U.S. at 138.

Here again, *Wisconsin Board* is directly in point: In striking down the Wisconsin Public Utility Anti-Strike Law, the Court expressly rejected the arguments of that State and others, which "stress[ed] the importance of gas and transit service to the local community and urge[d] that predominantly local problems are best left to local governmental authority for solution." 340 U.S. at 397. Noting the contrary view that federal regulation is desirable, the Court responded:

> The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by the Court. In our view, these questions are for legislative determination and have been resolved by Congress adversely to respondents. [*Id.*]

Likewise, *Bus Employees v. Missouri*, 374 U.S. 74, a post-*Garmon* decision, struck down a similar state statute because "Missouri has forbidden the exercise of rights explicitly protected by § 7 of the Act"; that being so, the Court did not deem it relevant to inquire whether that statute was "deeply rooted in state interests." [23]

The reason for this difference in approach is plain. Where, as here, the issue is one of *actual conflict* with federally created rights, rather than merely "potential

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[23] Other post-*Garmon* decisions which have held state law to be preempted because of substantive conflict with the NLRA, rather than because of the Labor Board's primary jurisdiction include, *e.g.*, *Teamsters Union v. Morton*, 377 U.S. 252, 258-260; *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 240 (citing *Hill*); *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635-637 and *Machinists, supra*, 427 U.S. 132, 148-151 (citing *Hill*). In none of these did the Court consider the strength of the state's interest.

As we stated in the text, *Belknap* is particularly instructive. The employer-petitioner relied on both lines of NLRA preemption doctrine; these were addressed separately in Parts III and IV of the opinion. The Court weighed the state's interest only in rejecting the employer's reliance on *Garmon*: "The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed." 51 L.W. at 5084.

frustration of national purposes" (*Garmon*, 359 U.S. at 244) whether substantive or administrative (*id.* at 241-246), the balancing of federal and state interests would be contrary to well-established general preemption principles:

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also *Jones* v. *Rath Packing Co.*, 430 U.S., at 526; *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U.S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. 663, 666 (1962); see also *Ridgway* v. *Ridgway*, 454 U.S. 46, 54-55 (1981). [*Fidelity Federal Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 153.]

In sum, the constitutional balance has already been struck by the Supremacy Clause. See *Hill*, 325 U.S. at 542, quoted at p. 16, *supra*. As stated in *Wisconsin Board*:

> The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. VI of the Constitution. Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand. [340 U.S. at 399.]

So here, since § 93(b) of the New Jersey Casino Control Act conflicts with the same federal legislation by restricting the employees' right to bargain through representatives *of their own choosing*, § 93(b) cannot stand.

III. THE PENSION AND WELFARE FUND DISQUALIFICATION IS PREEMPTED BY ERISA.

Section 93(b) of the Casino Control Act provides also that no labor organization may administer any pension or welfare fund if any officer, agent or principal employee is disqualified under § 86 of the Act. The court below held unanimously (J.S. App. 32a-33a) that this provision is preempted by § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), which reads as follows:

> Except as provided by subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

Here, as in the court below, appellants "contend that § 93(b) of the Casino Control Act does not 'relate to' employee benefit plans within the preemptive contemplation of ERISA." Dep't. Br. 45.[24] The Court of Appeals responded:

> That contention is belied by the plain language of the New Jersey statute:
>
> > No labor organization . . . may administer any pension or welfare funds, if any officer . . . is disqualified in accordance with the criteria contained in section 86 of [the] act. N.J. Stat. Ann. 5:12-93(b).
>
> These words cannot seriously be said not to "relate to any employee benefit plan." 29 U.S.C. § 1144(a).

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[24] Argument on this point is presented only in the brief for appellants Brown, et al., which is adopted in this respect by the other appellants; see Comm'n. Br. 26 n. 6.

> ERISA states that statutes relating to employee benefit plans are preempted even when their effect is indirect. 29 U.S.C. § 1144(c)(2). These preemption subsections have been definitively construed by the Supreme Court. "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525. In light of that construction the contention that section 93 and ERISA may lawfully coexist is fanciful. [J.S. App. 32a-33a.]

A. The language of § 514(a) and the holding in *Alessi* provide more than ample basis for the Court of Appeals' conclusion. Moreover, shortly after the decision below, this Court in *Shaw v. Delta Air Lines, Inc.*, —— U.S. ——, 51 L.W. 4968 (June 24, 1983) (*"Delta Air Lines"*), again construed § 514(a), and in so doing removed any possible doubt that New Jersey's pension and welfare plan disqualification law is preempted by ERISA:

> We have no difficulty in concluding that the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans. The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits clearly "relate to" benefit plans. We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. (Citations omitted) In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. [*Delta Air Lines*, 51 L.W. at 4971, footnotes omitted.]

Appellants, while observing grudgingly that § 514(a) is a "complicating factor" (Dep't. Br. 45), fail to face up to the Court of Appeals' reasoning, or to *Delta Air Lines*' holding that the words "relate to" are to be read "in their broad sense." Section 514(a) truly complicates appellants' task in defending New Jersey's pension and welfare plan disqualification provision, but § 514(a) greatly simplifies preemption analysis with respect to employee benefit plans covered by ERISA; indeed, as Senator Javits, one of the chief sponsors of ERISA, explained, its broad preemption language was adopted in place of a prior "formulation" which:

> raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme. [120 Cong. Rec. 29942, quoted in *Delta Air Lines*, 51 L.W. at 4971 n.20.]

See also the statements of Rep. Dent and Sen. Williams, quoted at 51 L.W. 4971.

B. The "considerations" (Dep't. Br. 45) which appellants proffer to save the State's law are entirely insufficient. The first two of these, which can usefully be considered together, identify two purposes of § 514(a). On the premise that neither of these purposes would be frustrated if § 93(b) were not preempted,[25] it is contended

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[25] That premise is untenable. The second objective identified by appellants is "to prevent state interference with the results of collective bargaining between labor and management, as expressed in terms of a benefit plan itself, *Alessi*, *supra*, 451 U.S. at 525-526." Dep't. Br. 45. Since the provision of the plan which provides for the union's joint participation in its administration is the product of collective bargaining (and for the union and the employees an important safeguard), disqualification of the union would unquestionably subvert Congress' acknowledged desire to prevent such State interference.

that § 514(a) is inapplicable. This reasoning is flawed because it rests on an incomplete list of the objectives of ERISA's "virtually unique preemption provision".[26] Congress in § 514(a) also sought to "reserv[e] to federal authority the sole power to regulate the field of employee benefit plans"[27] and to avert "the possibility of endless litigation over the validity of State action * * *."[28] The State's statutory scheme here is squarely inconsistent with both objectives. But even if appellants had correctly characterized all Congress' objectives their conclusion would not follow. The clear command of statutory language is not to be overridden because an argument can be made that to do so would not frustrate the legislature's perceived objectives. On the contrary, the language must be adhered to unless it can be stated with conviction either that Congress affirmatively did not intend that the language be read literally (a contention which *Delta Air Lines* forecloses), or that a literal reading would actually frustrate the objective of the legislature (a contention which appellants do not even advance).

As their third point, appellants seize upon this Court's acknowledgment that there is "some confusion" as to the scope of ERISA preemption (*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523), and that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan" (*Delta Air Lines*, 51 L.W. at 4971 n.21). Dep't. Br. 46. But here again, it is decisive that, as *Delta Air Lines* establishes, Congress chose to resolve "confusion" by using the sweeping phrase "relate to" in § 514(a). And it cannot plausibly be asserted that § 93(b) affects employee benefit plans in only a "tenuous, remote, or peripheral" manner. Indeed,

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[26] *Franchise Tax. Bd. v. Laborers Vac. Trust*, —— U.S. ——, 51 L.W. 4945, 4952 n. 26.

[27] Remarks of Rep. Dent, 120 Cong. Rec. 29, 197 (1974), quoted in *Delta Air Lines*, 51 L.W. at 4971.

[28] Remarks of Sen. Javits, quoted in the text above.

as acknowledged at Dep't. Br. 44-45, ERISA itself disqualifies certain persons from serving as administrators, etc., of employee benefit plans; Congress thereby left no doubt that in its view such regulation does "relate to" an employee benefit plan.[29]

C. Appellants rely also on § 514(d) of ERISA, which provides in part that nothing in ERISA shall be "construed to alter, amend, modify, invalidate, impair or supersede any law of the United States," arguing that §514(d) saves § 603(a) of the LMRDA and that the latter "as construed in *DeVeau v. Braisted* * * * permits New Jersey to impose its own disqualification standards on officers engaged in casino gaming industries." Dep't. Br. 46.

This argument is entirely specious. As shown at p. 35 n.20, *supra*, § 603(a) of the LMRDA preserves (with exceptions not presently relevant) State laws from preemption by "this Act", that is, by the LMRDA itself. A determination that a particular State law is preempted by the later-enacted ERISA is therefore entirely consistent with § 603(a).

Appellants not only seek to accord § 603(a) of the LMRDA a significance that provision does not have, they fail to accord proper significance to this Court's rejection of an argument in *Delta Air Lines* almost identical to appellants' argument here. It was there contended that the contested provisions of the New York Human Rights Law were saved from preemption because § 514(d) of ERISA preserves Title VII of the Civil Rights Act of 1964 and particularly the latter's anti-preemption provision, § 708. This Court held that insofar as the New

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[29] Section 411(a) of ERISA, 29 U.S.C. § 1111(a), disqualifies persons who have been convicted of certain crimes from serving "(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or (2) as a consultant to any employee benefit plan." It is particularly noteworthy that unlike New Jersey's § 93(b), ERISA does not disqualify any labor organization because one of its officers or employees has been convicted of a disqualifying offense.

York statute prohibited conduct which was lawful under the federal Civil Rights Act, the state law was not saved by § 514(d):

> Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, * * * it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no State made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. We fail to see how federal law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted. [51 L.W. at 4972, footnote omitted.]

So, too, the LMRDA is "neutral on the subject of all [union] practices it does not prohibit." And, *Delta Air Lines* held also that § 514(d) *does* preserve the New York Human Rights Law insofar as that Law prohibits conduct which is also prohibited by the federal Civil Rights Act. But this conclusion was reached only because, "[g]iven the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands." 51 L.W. at 4972. The LMRDA, by contrast, does not rely on State laws to accomplish its objectives. Thus, preemption of State laws relating to the administration of employee benefit plans would not "impair" the LMRDA, and § 514(d) of ERISA cannot save § 93(b) of New Jersey's Casino Control Act.

D. Finally, appellants rely heavily on *Local 1804, Int'l. Longshoremen's Ass'n v. Waterfront Comm'n*, 85 N.J. 606, 428 A.2d 1283 (1981), where the New Jersey Supreme Court "considered whether Section 8 of the Waterfront Commission Act, which mandated removal of disqualified union officials upon conviction in the trial court,

was preempted by a contrary provision contained in Section 411(c) of ERISA, 29 U.S.C. § 1111(c) (J.S. App. 24a), which deems a union official 'convicted' [and thus disqualified] only after all appeals had been exhausted." Dep't. Br. 46. The New Jersey court and a federal district court in New York faced with the same issue,[30] answered that question in the negative, "[a]pplying the preemption analysis set forth by this Court in *DeVeau v. Braisted.*" Dep't. Br. 47.

It is, perhaps, sufficient for present purposes that the courts in these Longshoremen's Union cases did not have the benefit of this Court's construction of § 514(a) of ERISA in *Alessi* and *Delta Air Lines.*[31] However, we need not take issue with the ultimate conclusion reached by these courts. The *DeVeau* "preemption analysis" may be correct even with respect to employee benefit plans for purposes of that portion of the longshoring industry which is regulated by the Waterfront Commission Act, which, as both courts recognized, was approved by Congress. 85 N.J. at 615-617, 428 A.2d at 1288-1289;[32] 495

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[30] *Int'l Longshoremen's Ass'n v. Waterfront Comm'n,* 495 F. Supp. 1101 (S.D. N.Y.), aff'd in part and rev'd in part on other grounds, 642 F.2d 666 (C.A. 2), cert. den., 454 U.S. 966.

[31] Indeed, the plaintiff unions in those cases apparently did not even rely on § 514(a). The federal district court did not refer to § 514 at all, see 495 F. Supp. at 1124-1125. And the New Jersey Supreme Court referred to § 514 only in passing, observing, "Neither of the express exceptions is relevant. Consequently, we are remitted to construing congressional intent according to the three criteria of *DeVeau* to determine whether ERISA § 411(c) preempts section 8." 85 N.J. at 615, 428 A.2d at 1288. We submit that if the express exceptions to § 514(a) were, as that court wrote, irrelevant, the proper course would be to follow § 514(a)'s express preemption provision rather than *DeVeau*'s guides to ascertaining Congress' intent where there is no express preemption provision. However, because, as we shall show in the text, § 514(d) may be applicable to an interstate compact, the result of the Longshoremen's Union cases, though not all of their reasoning, may be correct

[32] The New Jersey Court said:

> Despite the broad preemption provision of ERISA, the unique consent clause to the Waterfront Commission Compact is per-

F. Supp. at 1124-1125.[33] For, given that approval the Compact appears to be a "federal law" preserved by § 514(d) of ERISA. But this does not aid appellants in this case. Where, as here, there has been no Congressional approval, and § 514(a) of ERISA indisputably governs, the "reasoning employed in *DeVeau*, as well as in the *Longshoremen* cases" cited by appellants (Dep't. Br. 47) is irrelevant because in enacting ERISA Congress squarely determined that "the substantive and enforcement provisions of the conference substitute [enacted as ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. at 29933 (Senator Williams), quoted with approval in *Delta Air Lines*, 51 L.W. at 4971.

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suasive evidence of congressional intent not to preempt state action pursuant to the compact. * * * By approving the compact, Congress consented to stricter regulation of union officials in this narrow area. *DeVeau, supra*, 363 U.S. at 154. We conclude, therefore, that section 8 is not preempted by LMRDA §§ 504(c), 401(e) or ERISA § 411(c), and that the meaning of "convicted" under New Jersey law controls. [85 N.J. at 616-617, 428 A.2d at 1289.]

[33] The federal district court said:

In light of the special circumstances presented by waterfront union corruption, and given Congress' unique response approving the Compact with its enabling clause, it seems clear that Congress would tolerate if not commend WCA § 8's requirement that union officers resign or be removed before appeals are final, even though it is a departure from the federal rule. [495 F. Supp. at 1124-1125.]

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Nos. 83-498 & 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, *et al.*,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,

Appellees.

MARTIN DANZIGER, ACTING CHAIRMAN, THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY, *et al.*,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,

Appellees.

On Appeals from the United States Court of Appeals for the Third Circuit

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APPENDIX TO BRIEF FOR APPELLEES

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EXCERPTS FROM PLAINTIFFS EXHIBIT 1 IN HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, et al. v. G. MICHAEL BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, et al. (UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, No. 81-2630)

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[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

September 24, 1980

Bernard Katz, Esq.
Meranze, Katz, Spear and Wilderman
Lewis Tower Building
NE Cor. 15th and Locust St.
Philadelphia, Pa. 19102

Re: Local 54 H.R.E./Robert Lumio

Dear Mr. Katz:

This is to confirm our telephone conversation of September 17, 1980. Robert Lumio is to appear on September 29, 1980 at the Division of Gaming Enforcement headquarters at 11:00 a.m. for an interview. Said interview is to be conducted "under oath." While counsel may accompany Mr. Lumio to the Division headquarters, counsel will not be permitted to participate in the interview or be present in the interview room when the interview is conducted. It must be emphasized that this interview is to be the interview of Mr. Lumio and not of counsel; therefore, while Mr. Lumio may, as a courtesy, be permitted to consult with counsel, said consultation may not occur as a matter of course. Further, barring any health problems of Mr. Lumio that would prevent his appearance on September 29, 1980, I expect that Mr. Lumio will appear, whether with or without counsel, on September 29. His failure to do so will be evaluated in accordance with the criteria delineated in the applicable

provisions of the Casino Control Act and the Division will take whatever action is deemed appropriate.

If you have any questions with respect to this matter, please feel free to contact me. Thank you.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

EMS:ci

cc: Robert Lumio
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September 30, 1980

Eugene M. Schwartz, Esq.
Deputy Attorney General
State of New Jersey
Dept. of Law & Public Safety
Div. of Gaming Enforcement
Trenton, New Jersey 08625

RE: Robert Lumio and Division of Gaming Enforcement "Interview"

Dear Mr. Schwartz:

I was rather taken aback to receive your letter of September 24, 1980 concerning the above noted matter. I had specifically advised you that Mr. Lumio was hospitalized with a serious ailment and confined at Temple University Hospital. I advised you further that any discussion concerning Mr. Lumio's "interview" would have to await further medical developments concerning his condition.

In view of this advice, I simply do not understand your letter of September 24—received at my office well after my discussions with you in which you agreed that Mr. Lumio was not to appear.

Normally, therefore, I would conclude that your other comments were academic and would not bother with any further detail in this communication. However, I find the conditions which you set forth and the tone of your communication both offensive and wholly unwarranted.

I earlier wrote to you inquiring as to what provision of the law authorized you to conduct the curious type of proceeding which you were suggesting—indeed, demanding.

Subsequent to my correspondence—which has still gone unanswered by you—I stated to you that I had not encountered the type of proceeding which you were demanding since reading about the office of the Grand Inquisitor in the 15th Century. Your letter of September 24, 1980, "demands" that without any stated cause and without any judicial proceedings, a union official be placed in a private room with you and your colleagues. You demand that the union official, without any prior knowledge of what will be asked, respond under oath to any questions put to him and that he do so without benefit of either his own counsel in the room or any other person to protect and represent his interests. Your audaciousness in then stating that a failure or refusal to submit to a procedure found earlier in medieval Spain will then require that ". . . whatever action is deemed appropriate" is really beyond further comment.

I would appreciate a response to this letter as well as a response to my earlier communication. In the meantime, I shall, of course, advise you when Mr. Lumio is sufficiently recovered so as to make this interchange more than "academic."

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By BERNARD N. KATZ

BNK:maf
UIW/SIU
C.M.R.R.R.

[SEAL]

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT
CN 047
Trenton, New Jersey 08625

October 6, 1980

Bernard Katz, Esq.
Meranze, Katz, Spear and Wilderman
Lewis Tower Bldg.
N.E. Cor. 15th and Locust Street
Philadelphia, Pa. 19102

Re: Robert Lumio

Dear Mr. Katz:

I am in receipt of your letter dated September 30, 1980 which was written with respect to the above subject. Perhaps I misunderstood our conversation concerning the interview that the Division of Gaming Enforcement wanted to have with Mr. Lumio; however, I was not under the impression that there was no possibility that Mr. Lumio would be able to appear at Division headquarters on September 29. Thus, the issuance of my September 24, 1980 letter. Indeed, that is why my letter referred to his health problems.

I cannot understand your assertion in your letter that I have not responded to the substance of your inquiries concerning the propriety of the Division's procedure with respect to investigative interviews. Rather, you and I have discussed the said procedures and I have explained to you applicable provisions of the Casino Control Act. Additionally, you should be advised that the Division procedure with respect to said interviews passes constitutional muster.

The Division is still desirous of interviewing Mr. Lumio. Accordingly, I would appreciate your advising me when he leaves the hospital in order that we may schedule the interview. Furthermore, in this regard, in order that I may maintain an accurate and complete file on this matter, please forward to me a copy of Mr. Lumio's medical records with respect to his present medical condition.

I thank you in advance for your anticipated cooperation.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

EMS:ci

October 13, 1980

Eugene M. Schwartz
Deputy Attorney General
State of New Jersey
Department of Law & Public Safety
Division of Gaming Enforcement
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio

Dear Mr. Schwartz:

This will acknowledge receipt of your letter of October 6, 1980. There is really not too much purpose to be served by a continued exchange of correspondence at such time as Mr. Lumio is released from the hospital and we may conclude what, if any, further arrangements are appropriate.

For your general information, it has been necessary to have Mr. Lumio removed from Temple University Hospital and transferred to Pennsylvania Hospital. We are hopeful that his condition will see improvement in the future.

I am curious about what seems to be a continuous reluctance on your part to give me a clear and direct response to my questions. I asked you in my first letter as well as during our telephone conversations just where there appeared any statutory or other authority for your Department to require that a non-employee (or an employee) of a casino present himself (or herself) at your office, be taken to a private room without counsel and then, to be required to submit to questioning under oath in the presence of you and your colleagues—but without any representation or other protections on the part of the person being questioned.

You state that this "procedure" passes "constitutional muster". Although I do not pretend to be an expert in

that field, I have serious reservations about the accuracy of your statement. This reservation becomes more pronounced when re-reading your statement that although a witness may leave the room to consult with counsel on some questions—he may not leave the room to consult with counsel on all questions or questions which you regard as not warranting the outside consultation. Your October 6, 1980 letter leaves me no less offended by this modern day star chamber inquisition type of procedure than I found myself upon first being advised of your intentions.

I shall contact you further when Mr. Lumio regains his health—a condition which we all hope will occur in the near future.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

BERNARD N. KATZ

BNK:jmb
UIW/SIU

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

December 2, 1980

CERTIFIED MAIL—RRR

Robert Lumio
Secretary-Treasurer
Hotel, Restaurant and Country Club Employees
Local Number 54
200 North Texas Avenue
Atlantic City, New Jersey

Dear Mr. Lumio:

By letter dated August 26, 1980, the Division of Gaming Enforcement notified you that it was necessary that you be interviewed by Division personnel with respect to the registration process pending before the Casino Control Commission pertinent to the labor union with which you are associated. That interview, which was to be scheduled for September 17, 1980, was adjourned at the request of your attorney. However, the re-scheduled interviewed which was to take place on September 29, 1980 was also adjourned as a result of your medical condition. Although your interview was postponed to a date uncertain, the Division remained desirous of effectuating an interview with you. It now appears that you are no longer hospitalized. Thus, the Division wants to complete the interview process. Accordingly, please be advised that you are to appear at the Division of Gaming Enforcement headquarters located at 2465 South Broad

Street in the Independence Mall Shopping Center in Trenton, New Jersey on December 12, 1980 at 10:00 a.m. The interview will be conducted at that time. Please note that you will be under oath during the interview. This interview is a necessary component with respect to the Division review of the credentials of the above-named labor organization.

I anticipate seeing you at Division headquarters on December 12, 1980. If you have any questions about this matter, please feel free to contact me.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

EMS:ci
cc: Bernard Katz

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

December 8, 1980

Eugene M. Schwartz
Deputy Attorney General
Division of Gaming Enforcement
Department of Law & Public Safety
State of New Jersey
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio and Casino Control Commission

Dear Mr. Schwartz:

I am in receipt of your rather presumptuous letter of December 2, 1980. You behave as if you and I have not exchanged prior correspondence and as if you and I have had no prior discussions concerning this matter.

Frankly, I do not understand the attitude reflected by your correspondence and by your position. This attitude is made more offensive by behavior such as that exhibited by your Sergeant McLaughlin in his telephone call to me expressing cynical and snide reactions to my description of Mr. Lumio's physical problems. I do not appreciate the "wise-guy" attitude of some of your colleagues and the insensitive, almost arrogant response to a serious and grave illness.

As simply as can be stated, you are to understand that the question of whether or not Mr. Lumio will submit to your star chamber type of proposed proceeding is at this time academic. He is in no condition to participate in

any interview under oath or other formal investigation scheduled for December 12, 1980.

Up until recently, Mr. Lumio was confined to Pennsylvania Hospital at which place he had been for an extensive period of time undergoing radical treatment. He is still continuing the treatment which includes, among other things, chemotherapy. I earlier had offered to you, and I similarly offered to your Sergeant McLaughlin, the right of access to Mr. Lumio's medical records at Pennsylvania Hospital or at Temple University Hospital at which institution he had his initial stay.

If you have any reservations concerning the authenticity of his physical condition, you are free to use this letter to review the medical records at either hospital which you desire—Pennsylvania Hospital being the more relevant.

At the present time, Mr. Lumio is in a convalescent and treatment status. He simply is not able to undertake the rigors of travelling to Trenton and participating in the procedure which you desire. At such time as he is in a condition of so participating, he and I will proceed to Trenton together. We will, at that juncture, take up with you the question of whether of not we will submit to the inquisitorial type of questioning which you propose. I indicated to you before that as an attorney who has regard and respect for the system under which we function, and who has participated in all types of administrative proceedings for more than twenty-five years, I am shocked and appalled at your position that you have a right to isolate a person with whom you desire an interview and to require that such person submit to closed closet, under oath questioning in a room from which his attorney is barred and which is peopled only by you, your own staff and the person being questioned. Every fiber of my training as an attorney,

schooled with respect for constitutional rights and protections, along with basic fairness and decency, is irritated by your proposal.

I had earlier requested—as a matter of fact, on several occasions—some guidance from you in understanding where you receive the legal basis for making the demands which you did. As I read the Casino Control Act, the powers therein granted do not seem to be superior to those of a Grand Jury. They do not seem to encompass a right to conduct the type of 15th Century procedure which you are contemplating. I am appalled—and have so expressed to you on several earlier occasions—that you would see fit to insist upon placing a witness in a closed room, barring his attorney, deciding for yourself when and on what occasions he may consult his attorney outside of the room, and putting to him questions under oath which he will be required to answer—witnessed only by you and your own colleagues. This procedure violates every conceivable element of a free and democratic society.

I do not intend to conduct a correspondence dispute on the curious philosophies which you are reflecting. It is at this juncture academic. As soon as Mr. Lumio is physically able to participate in any "interview" procedure, I shall again be in touch with you for purposes of determining the format of such a procedure.

In the meantime, it is important that you respond to my repeated inquiries—under what provisions of the law do you contend you are empowered to insist upon the procedures which your earlier correspondence and

telephone communications describe? Please let me hear from you at your earliest convenience.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

BERNARD N. KATZ

BNK:jmb
UIW/SIU

cc: John J. Degnan,
Attorney General
G. Michael Brown,
Director

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

December 15, 1980

Bernard N. Katz, Esq.
Meranze, Katz, Spear and Wilderman
N.E. Corner 15th & Locust Street
Lewis Tower Building, 12th floor
Philadelphia, Pennsylvania 19102

Re: Robert Lumio

Dear Mr. Katz:

I am in receipt of your correspondence of December 8, 1980, addressed to Deputy Attorney General Eugene Schwartz, Supervising Attorney of the Service Industry Licensing Section. Representatives of this Division have spoken to two physicians who have treated Mr. Lumio. We received similar reports from both of the physicians indicating, in their medical opinion, they would have no objection to Mr. Lumio submitting to a formal interview with the Division of Gaming Enforcement.

I find the remainder of your letter to be so unprofessional that it does not warrant a response. If Mr. Lumio is to be represented before the Casino Control Commission, I suggest that he be represented by an attorney

admitted to the practice of law in the State of New Jersey.

Very truly yours,

/s/ G. Michael Brown
G. MICHAEL BROWN
Director

GMB:cat

cc: John J. Degnan, Attorney General
Eugene Schwartz, Deputy Attorney General

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

December 26, 1980

G. Michael Brown, Director
Division of Gaming Enforcement
Department of Law & Public Safety
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio

Dear Mr. Brown:

Your letter dated December 15, 1980 was delivered to my office on December 23, 1980. I attempted to ascertain the accuracy of the report given to you and to which you make reference in the first paragraph of your letter.

In view of the fact that you do not name the physicians nor the persons who have spoken to them, it was difficult to properly check out the information which you state you have received. If you could advise me of the names of the doctors and the identity of your representatives who spoke to them, I will be in a better position of ascertaining whether there is any reason to believe that Mr. Lumio is physically capable of participating in the procedure which you are proposing. I can only assure you that the information given to me to date indicates the contrary that Mr. Lumio is being required to return to the hospital and anticipates a further confinement.

However, I will certainly review such facts as you indicate you have concerning his physical condition and

consult with the doctors whose names I assume you will forward to me.

The second paragraph of your letter is offensive and I am able to find nothing in the law which insulates your office and the functioning of your department from appropriate criticism and questioning. Rather than react as you did in your letter of December 15, 1980, you would have been better advised to have responded to my questions which I have put on several occasions to your colleague, Mr. Schwartz. I simply do not understand the insistence upon the interrogation procedure which was described to me and about which I have been protesting. I reiterate my original inquiries—under what statutory or other provision have you based a procedure which requires a witness to testify under oath, in a private room, unaccompanied by his counsel, and in the presence solely of the Deputy Attorney General and his various assistants?

The abuses which can flow from such a proceeding would seem self-evident and obvious to even the most untutored observer. I do not intend to belabor the point any further. The entire situation is beginning to reflect some rather curious difficulties in communication of basic concepts. At the present time, because of Mr. Lumio's physical condition and until that issue is resolved, the problem would seem academic. I can assure you that I will follow up on the physical condition questions upon receipt of the information which I have requested from you. At such time as Mr. Lumio is in a position of responding to your interrogation, we shall determine whether we will insist upon counsel being present with Mr. Lumio during the questioning procedure. Again—in order to avoid unnecessary controversy—I repeat the question which I have been posing to your office—under which statutory or other authority do you base your claim that you have a right to exclude counsel from the under oath interrogation procedure and situs?

I find the last portion of the final sentence in your letter to be both irresponsible and an affront and I hereby formally request that you apologize for the statements and inferences contained in the last sentence of that letter and that you retract that statement with a prompt communication to me and copies of such retraction to all persons who received copies of your December 15, 1980 letter.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

/s/ B.N.K.
BERNARD N. KATZ

BNK:jmb
UIW/SIU

cc: John J. Degnan, Attorney General
Eugene Schwartz, Deputy Attorney General

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

December 30, 1980

Bernard N. Katz, Esq.
Meranze, Katz, Spear and Wilderman
Lewis Tower Building, 12th floor
N.E. Corner 15th & Locust Street
Philadelphia, Pennsylvania 19102

Re: Robert Lumio

Dear Mr. Katz:

I am in receipt of your letter of December 26, 1980. Representatives of this Division interviewed Dr. Edward Viner on December 2, 1980, and Dr. Richard Smalley on November 25, 1980.

Very truly yours,

/s/ G. Michael Brown
G. MICHAEL BROWN
Director

GMB:cat

cc: John J. Degnan, Attorney General
Eugene Schwartz, Deputy Attorney General

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January 8, 1981

G. Michael Brown
Director
State of New Jersey
Department of Law & Public Safety
Division of Gaming Enforcement
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio

Dear Mr. Brown:

Mr. Lumio is presently again confined at Pennsylvania Hospital. I personally visited him in Room 422 and was advised that he is expected to be confined there for at least the next two to three weeks.

At such time as he has been released from the hospital, I shall further contact your office concerning his condition. In the meantime, you should know—and if your investigators, in fact, inquired in any depth into Mr. Lumio's condition—you are aware—that he has been receiving massive and traumatic chemotherapy and all types of radical treatments designed for the serious condition which afflicts him.

As I earlier advised your colleague, these treatments have been going on during the course of our interchange of correspondence, hence making the various insistences reflected in your letters rather difficult to understand. In the meantime, I would appreciate some response and

answers to the various questions which I have posed in my correspondence to your office.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

/s/ B.N.K.
BERNARD N. KATZ

BNK:jmb
UIW/SIU

attachment

cc: John J. Degnan, Attorney General
Eugene Schwartz, Deputy Attorney General

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

January 12, 1981

CERTIFIED MAIL

Robert Lumio
Secretary-Treasurer
Hotel, Restaurant and Country Club Employees
Local Number 54
200 North Texas Avenue
Atlantic City, New Jersey

Dear Mr. Lumio:

Please be advised that you are to appear at Division of Gaming Enforcement headquarters, 2465 South Broad Street in the Independence Mall in Trenton, New Jersey, at 10:00 a.m. on January 23, 1981 for the purpose of being interviewed under oath by Division of Gaming Enforcement personnel. I look forward to seeing you at that time.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

EMS:ci

cc: Bernard Katz, Esq.
Certified Mail

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MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

January 20, 1981

Eugene M. Schwartz
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Division of Gaming Enforcement
Trenton, NJ 08625

RE: Robert Lumio

Dear Mr. Schwartz:

You, apparently, sent a letter dated January 12, 1981 to Mr. Lumio at his office address in Atlantic City. You declared in that letter that he is to appear on January 23, 1981 to be interrogated under oath by your Department. Your letter also shows that a carbon copy purports to have been sent to me.

I direct your attention to the interchange of correspondence which has been going on over the past weeks, copies of which have been dispatched to your attention. You should know from that correspondence that Mr. Lumio is in the hospital and as of this writing is still confined. You should further know from that correspondence that he was in the hospital on the date that you dispatched your January 12, 1981 letter. I also point out to you that although the letter to Mr. Lumio indicates a copy to me that as of this date no such copy has been received.

I would suggest that in the future before you unilaterally make arrangements such as appear in your

letter that you first telephone me. As would seem obvious, Mr. Lumio is not in a position of responding to your communication at this time. At such time as he is released from the hospital, I shall contact you in order to discuss the appropriate arrangements for the questioning of him.

If you have any further questions, please contact me. In the meantime, I again request some response to the questions which I have been posing in my correspondence to you and to Mr. Brown and which as of this date have still gone unanswered.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By: BERNARD N. KATZ

BNK:ckt
UIW/SIU

cc: G. Michael Brown, Director
John Degnan, Attorney General

TEMPLE UNIVERSITY
of the Commonwealth System of Higher Education
HEALTH SCIENCES CENTER
Philadelphia, Pennsylvania 19140

Department of Medicine
Section of Hematology and Oncology

January 16, 1981

Mr. Bernard M. Katz
Meranze, Katz, Spear and Wilderman
Twelfth Floor
Lewis Tower Building
N. E. Cor. 15th and Locust Streets
Phila., PA 19102

Re: Robert Lumio

Dear Mr. Katz:

In response to your letter of January 9, as you indicate, I was interviewed by Sargeant McLaughlin of the New Jersey State Police on November 18, 1980. Sargeant McLaughlin showed me his identification and gave me a photostat of a notarized release signed by Mr. Lumio authorizing release of information to the New Jersey State Gaming Commission. I indicated to Sargeant McLaughlin that Mr. Lumio had been a patient in the Temple University Hospital, that he was admitted with a diagnosis of cellulitis of the great toe and acute lymphatic leukemia, that he was placed under treatment for both of these conditions here and that he had been responding to treatment at the time that he voluntarily left our care and sought medical attention at Pennsylvania Hospital under the care of Dr. Ed Viner. I further told Sargeant McLaughlin that I had received no direct word from Dr. Viner regarding Lumio's future course following admission to Pennsylvania Hospital but that I had heard indirectly that Mr. Lumio had subsequently gone into a complete response as regards his acute leukemia. I indi-

cated to Sargeant McLaughlin that, in general, patients who are in complete response and continuing under treatment for their acute leukemia are symptomatically and physically well and in general are able to function. I told Sargeant McLaughlin that I had not seen Mr. Lumio since he left Temple Hospital and was therefore not able to offer an opinion as to whether or not Mr. Lumio was functioning normally and whether or not he would be able to partake in any sort of testimony. I referred Sargeant McLaughlin to Dr. Viner for any further information.

I hope this information is satisfactory. By the way, you indicate in your letter that Mr. Lumio is still under my care. He left our care on Oct. 7th and sought treatment elsewhere.

Please call if you need further information.

Sincerely yours,

/s/ R. V. Smalley, M.D.
RICHARD V. SMALLEY, M.D.

RVS/dao

January 23, 1981

Eugene M. Schwartz,
Deputy Attorney General
State of New Jersey
Department of Law & Public Safety
Division of Gaming Enforcement
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio

Dear Mr. Schwartz:

In accord with our conversation on Tuesday, January 20, 1981, I am enclosing herein a xerox copy of Dr. Smalley's letter to me. You will note that its contents are contrary to the report which apparently was submitted to your Department.

I would appreciate your directly any further correspondence which is to go to my attention to my Lewis Tower Building address. The mail will be more expeditiously handled in that fashion. Our Atlantic City address is no longer the Atlantic Avenue office but is now 200 North Texas Avenue. However, for fast and more efficient responses, your use of my Philadelphia office would be appreciated.

As soon as I have received a response from Dr. Viner, I shall forward that to you as well. In the meantime, I will look forward to contacting you after Mr. Lumio's discharge from the hospital.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

BERNARD N. KATZ

BNK:jmb
UIW/SIU

enc.

cc: John J. Degnan, Attorney Gen.
G. Michael Brown, Director

VINER/DANIELS MEDICAL ASSOCIATES
Pennsylvania Hospital
727 Delancey Street
Philadelphia, Pennsylvania 19107

Telephone 829-3523

23 January 1981

Bernard N. Katz, Esq.
12th Floor, Lewis Tower Bldg.
N.E. Corner 15th & Locust Sts.
Phila., Pa. 19102

Re: Robert Lumio

Dear Mr. Katz:

I was interviewed by someone from the Division of Gaming Enforcement sometime during December. At that time I indicated that Mr. Lumio had an acute leukemia and that he had been very seriously ill. I further indicated that he was in a period of remission and that whether or not he could appear and testify was dependent upon how he felt at the specific time at issue. In general, how patients feel during their remission periods is quite variable, often they feel well enough to tolerate such an interrogation and at other times they may have significant fatigue and a sense of debility.

To clarify further with respect to Mr. Lumio and to bring you and everyone else up to date, at this very moment, he is in the hospital receiving x-ray therapy to his brain and injections of chemotherapy into his spinal fluid via a series of six spinal taps. This is in an attempt to prophylax against the possibility of future recurrence of his acute leukemia. Certainly, at the present moment he is totally unable to undergo an appearance in Trenton for these treatments have rendered him quite uncomfortable and debilitated. He is currently fatigued, having

headaches and low back pain as a result of the therapy. There are also slight changes in his blood count which worry me a bit concerning the possibility that he may be developing a recurrence of his leukemia.

Thus, irrespective of my statements at the time of the visit of the government representative, at this time, Mr. Lumio is certainly unfit for such a proceeding and will remain so for the immediate future at least. The only way I can be fair to you, both, the patient and the government here, is to make statements periodically concerning his situation at that time for I can make no statement that will be meaningful more than several weeks hence at any point in such a medical circumstance.

If there are further questions, please let me know.

Sincerely yours,

/s/ E. D. Viner
EDWARD D. VINER, M.D.

EDV:kmr

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

February 4, 1981

Certified Mail

Robert Lumio
Secretary-Treasurer
Hotel, Restaurant and Country Club Employees
Local Number 54
200 North Texas Avenue
Atlantic City, New Jersey

Dear Mr. Lumio:

As it appears that you are no longer hospitalized at the University of Pennsylvania Hospital, please be advised that you are to appear at Division of Gaming Enforcement headquarters, 2465 South Broad Street in the Independence Mall in Trenton, New Jersey, at 10:00 a.m. on February 13, 1981 for the purpose of being interviewed under oath by Division of Gaming Enforcement personnel. Additionally, please note that I have enclosed herein a fresh "Release Authorization". Please sign it, have it notarized and return it to me, as expeditiously as is possible, in the enclosed reply envelope.

I thank you for your attention to these matters and I look forward to seeing you on February 13.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

EMS:ci
Encl.

cc: Bernard Katz, Esq. (w/att.)
Certified Mail

RELEASE AUTHORIZATION

To All Courts, Probation Departments, Selective Service Boards, Employers, Educational Institutions, Banks, Financial and Other Institutions, and all Governmental Agencies—federal, state and local, without exception, both foreign and domestic.

I have authorized the New Jersey Casino Control Commission and the New Jersey Division of Gaming Enforcement to conduct a full investigation into my background and activities.

Therefore, you are hereby authorized to release any and all information pertaining to me, documentary or otherwise, as requested by any appropriate employee, agent or representative of the Division of Gaming Enforcement or the Casino Control Commission.

This authorization shall supercede and countermand any prior request or authorization to the contrary.

A photostatic copy of this authorization will be considered as effective and valid as the original.

DATE: _____ _____ L.S.

Subscribed and sworn to before me

on this ____ day of _____,

19—.

Notary Public

State of _____

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

February 4, 1981

Eugene M. Schwartz
Deputy Attorney General
Department of Law and Public Safety
Division of Gaming Enforcement
Trenton, NJ 08625

RE: Robert Lumio

Dear Mr. Schwartz:

I am enclosing herein a Xerox copy of a letter which I have received from Dr. Edward Viner. You will note that Dr. Viner's statements are contrary to those that were reported to your Department by your investigator. This now makes the second doctor (out of two) who indicates that the comments made to your investigator were not quite the same as your investigator understood them to be. This is as kind a description as I can, under all of the circumstances, make.

I draw your attention to Dr. Viner's comment concerning Mr. Lumio's lack of fitness to presently participate in the proceeding. He does indicate that he will again review the situation in several weeks. I have written to Dr. Viner to thank him for his letter and the trouble to which he has gone and to request that he advise me at such time as Mr. Lumio is able to participate in a questioning under oath session and I will at that time then contact you further. Under the circumstances involved, and in view of the distressing illness present, I assume that this is satisfactory. Incidentally, in the meantime, I

really would appreciate some response to the other inquiries which I have consistently been making in my earlier correspondence concerning the statutory or other authority for insisting upon under oath questioning without benefit of counsel.

Thank you for your cooperation.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By: BERNARD N. KATZ

BNK:ckt
UIW/SIU

Enc.

cc: John J. Degnan
G. Michael Brown

February 4, 1981

Edward D. Viner, M.D.
Viner/Daniels Medical Associates
Pennsylvania Hospital
727 Delancey Street
Philadelphia, PA 19107

RE: Robert Lumio

Dear Dr. Viner:

Thank you for your letter of January 23, 1981 concerning your patient, Mr. Robert Lumio. I would appreciate your advising me at such time in the future that you feel Mr. Lumio is sufficiently recovered so as to participate in an under oath interrogation of the nature which has been described to you.

Again, my appreciation for your troubles.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By: BERNARD N. KATZ

BNK:ckt
UIW/SIU

cc: Frank Gerace
Robert Lumio

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

February 10, 1981

Eugene M. Schwartz,
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Division of Gaming Enforcement
CN 047
Trenton, NJ 08625

In Re: Robert Lumio

Dear Mr. Schwartz:

This letter will confirm our telephone conversation of February 9, 1981. Your suggested date of February 13, 1981 is not available on my calendar. We tentatively set a date of February 18, 1981 for me to appear with Mr. Lumio in Trenton to meet with you. This tentative date, however, was subject to Mr. Lumio's physical capabilities. By the time you receive this letter, you certainly should have received the xerox copy of Doctor Viner's communication, indicating the problems to which Mr. Lumio is subject.

Accordingly, the question of whether or not the February 18, 1981 date is firm will depend upon Mr. Lumio's physical capabilities and Doctor Viner's advice as his physician. You will note that a carbon copy of this letter has been sent to Doctor Viner and I would request that he advise me, as a result of receiving this carbon copy, whether Mr. Lumio may appear on the February 18,

1981 date. If, in his opinion, the date should be postponed until some subsequent time more consistent with Mr. Lumio's physical condition, I would appreciate hearing so from him—if, in his opinion, it is satisfactory for Mr. Lumio to appear, we will be there as discussed. Under any conditions, I will contact you prior to February 18, 1981 to advise you of the conclusions reached.

I also remind you of the content of our discussion concerning the procedure to be used during the interview of Mr. Lumio. We have not been able to find any basis whatsoever for the peculiar position advanced that counsel may not be present in the room during the interview. On the contrary, our Research and Analysis indicates that the act does not envision this type of procedure and that, in fact, counsel should be present during the interview. Accordingly, I will anticipate that opportunity being accorded.

I have instructed Mr. Lumio—who, at the time of my conversation, had not received either your original letter of February 4, 1981 nor the enclosure—to execute the Release Authorization as soon as he has received it and to return it to you.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

BERNARD N. KATZ

BNK/kt

cc: Dr. Edward Viner

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
215-KIngsley 6-4183

February 18, 1981

Eugene M. Schwartz, Esq.
Deputy Attorney General
State of New Jersey
Dept. of Law & Public Safety
Div. of Gaming Enforcement
CN 047
Trenton, New Jersey 08625

RE: Robert Lumio

Dear Mr. Schwartz:

This will confirm our conversation on Tuesday, February 17, 1981. We agreed to postpone Mr. Lumio's appointment for questioning which had been scheduled for Wednesday, February 18, 1981. I advised you that Dr. Viner did not approve of Mr. Lumio undertaking this activity and further, that Mr. Lumio was scheduled to return to the hospital this week for further treatment. I noted Dr. Viner's telephone number and invited you, if you so desire to confirm this advice directly with him.

It is my understanding that the status of Mr. Lumio's appointment for questioning will be generally held in abeyance until such time as Dr. Viner advises us that Mr. Lumio is in satisfactory condition to participate in that type of activity.

I believe that the aforegoing accurately brings the record up to date. If there are any further questions, or if you desire any further information, please get back to me. It is my understanding that you have already received

from Mr. Lumio an executed renewed authorization to examine records and documents.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By BERNARD N. KATZ

BNK:maf
UIW/SIU
C.M.R.R.R.

CC: Dr. Edward Viner

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

CN 047

Trenton, New Jersey 08625

March 5, 1981

Mr. Frank Gerace
President
Hotel, Restaurant and County Club Employees
Local Number 54
200 North Texas Avenue
Atlantic City, New Jersey 08401

Dear Mr. Gerace:

This will confirm your interview with Division of Gaming Enforcement personnel regarding the registration process of Local Number 54.

In accordance with your telephone conversation with Detective Michael McLaughlin, the interview is scheduled for 10:00 a.m. on Thursday, March 12, 1981 at Division of Gaming Enforcement headquarters located at 2465 South Broad Street in the Independence Mall Shopping Center in Trenton, New Jersey. The interview will be under oath.

I anticipate seeing you on March 12. If you have any questions about this matter, feel free to contact me at (609) 984-7222.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Eugene M. Schwartz
EUGENE M. SCHWARTZ
Deputy Attorney General

RJF:smb

cc: Bernard N. Katz, Esq.

CERTIFIED MAIL RRR

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pa. 19102
215-KIngsley 6-4183

March 9th, 1981

Eugene M. Schwartz,
Deputy Attorney General
Department of Law and Public Safety
Division of Gaming Enforcement
CN 047
Trenton, NJ 08625

In Re: Gaming Enforcement Questioning of
Frank Gerace

Dear Mr. Schwartz:

Thank you for sending me a copy of your letter dated March 5th to Mr. Gerace.

In view of the fact that you anticipate the interview being under oath, it has been concluded that I should be present during the questioning.

March 12th involves a conflict on my calendar. I am, however, available Monday, March 16th. Mr. Gerace is similarly available. It is my understanding that he has already so advised your colleague, Detective McLaughlin. Accordingly, he and I will be present at 10:00 a.m. on Monday, March 16, 1981 at the address noted in your

letter of March 5th, and you will assume that the March 12th appointment is cancelled.

Very truly yours,

MERANZE, KATZ, SPEAR
AND WILDERMAN

By: BERNARD N. KATZ

BNK:k
UIW/SIU

CC: Mr. Frank Gerace

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT

IN THE MATTER OF THE
INVESTIGATIVE INTERVIEW OF FRANK GERACE

Independence Mall
South Broad Street
Trenton, New Jersey
March 16, 1981
10:05 A.M.

APPEARANCES:

JOHN J. DEGNAN, Attorney General
By: KENNETH J. FORTIER, Deputy Attorney General

For the Division

MERANZE, KATZ, SPEAR & WILDERMAN, ESQS.
By: BERNARD N. KATZ, ESQ.
For Local 54 & Frank Gerace

ALSO PRESENT:

DETECTIVE SERGEANT MICHAEL MCLAUGHLIN

By: CAROLYN CUMMINGS, C.S.R.

MR. FORTIER: Presently it is March 16th, 1981, a Monday. We are at the Division of Gaming Enforcement Headquarters in Trenton, New Jersey.

Present in the conference room at our headquarters is Mr. Frank Gerace, who I believe is President of Local 54—

MR. KATZ: That is correct.

MR. FORTIER: —his attorney, Mr. Bernard Katz; myself, Ken Fortier, a representative of the Division of Gaming Enforcement; as well as Detective Michael McLaughlin, who is also with the Division of Gaming Enforcement.

In conjunction with a registration that was filed with the Casino Control Commission by Local 54, the Division has deemed it necessary to conduct an interview with Mr. Frank Gerace, an official of that union. Mr. Gerace and his attorney, Mr. Katz, had been advised and scheduled today for that interview.

Both have been advised that it is the policy of the Division of Gaming Enforcement that counsel for an interviewee, as Mr. Gerace is, cannot be present during the actual interview. However, he may remain outside of any room we use for the interview, and should his client, in this case Mr. Gerace, at any time feel he requires the advice of or counseling of his attorney, he may leave the room to obtain that advice or counseling.

It is my understanding from Mr. Katz that his client will not participate in an interview under those circumstances. However, instead of myself speaking for Mr. Katz and his client, I'm certain Mr. Katz would like to put something on the record in that regard.

The only other thing I would add that I would like it also be on the record made known to Mr. Gerace and Mr. Katz that it is our interpretation of the Casino Control Act that the failure of Mr. Gerace to participate in this interview may precipate the loss of a license for Local 54 through the Casino Control Commission.

If you would like, Mr. Katz, to place something on the record, feel free.

MR. KATZ: Mr. Fortier, I gave my card to the Reporter and requested to either be given or to be allowed to purchase a copy of this transcript. May I assume that I will be able to purchase a copy of the transcript?

MR. FORTIER: Before you leave today, I will talk with those superiors to myself at the Division of Gaming Enforcement just to make sure because I don't want to tell you definitely yes and at some point come back and renege on that. I won't go any further.

MR. KATZ: For purposes of the record, my name is Bernard N. Katz. I'm a partner in the firm of Meranze, Katz, Spear & Wilderman. We have been for sometime general counsel for Local 54 HRE. I am a member of both the Pennsylvania and the New Jersey Bar.

My Pennsylvania address is on the card which I gave to the Court Reporter, and I'd appreciate correspondence being sent to that address rather than to the New Jersey address for purposes of personal convenience. Although, if it is sent to the New Jersey address, it will come to my attention, also.

We are participating in this interview, and we'll be happy to participate in this interview. Mr. Gerace is sitting here to be interviewed and you may ask any and all questions which you so desire of him.

So I want it understood that he is not refusing to be interviewed.

Before I get into the details of that, which I would like to put in the record, may I inquire of you, Mr. Fortier, for a specific statement as to the "purpose" of this interview and whether or not Mr. Gerace is personally a "target" of any particular investigation?

MR. FORTIER: Off-the-record.

(Discussion held off-the-record.)

MR. FORTIER: In regards to your question as to whether Mr. Gerace is a "target," before I answer that

I will only point out that this is not a criminal investigation. It is an administrative investigation so technically the term "target" I do not feel is even appropriate.

However, to answer the question, he is not a "target" by virtue of the fact that it's not a criminal investigation. It is an administrative procedure used by the Division of Gaming Enforcement to ascertain the qualifications of people applying for licenses with the Casino Control Commission. In this case Local 54 has filed a registration, and this is an interview to determine the qualifications of that union and its officials to represent the casino employees in Atlantic City.

MR. KATZ: Maybe I didn't make my question clear. I don't mean it necessarily in terms of criminal context. But in view of the fact that Mr. Gerace is the President of Local 54 and has been now for some time and in view of the fact that the registration was filed some time ago and in view of the fact that we now have collective bargaining agreements covering a wide variety of casinos and representing the welfare and interests of thousands of employees, is there anything in particular which has caused at this late date this interview or is this part of a normal periodic routine?

MR. FORTIER: Exactly. It is part of a normal periodic routine of the Division of Gaming Enforcement. It is standard operating procedure for us to review and evaluate the qualifications for people who need licenses in Atlantic City or unions that have to register to obtain a license.

The only other thing I would like to add is that I know prior to this I put on the record that a possible outcrop of Mr. Gerace's refusal to cooperate, if he does refuse to cooperate, and I know you have certain qualified language you want to put on the record. But I had indicated that potentially it could be used as a disqualifying factor if he does not cooperate.

I also pointed out that our position is that more specifically if he does not cooperate during the interview and

take part in the interview, the Division will take the position that it is a disqualifying factor under the Casino Control Act. So I will be a little more specific as to what the Division will do if he does not cooperate or if he does not participate in the interview.

MR. KATZ: I can't secondguess what the Division will do. Within the limitations of my abilities, all I can do is advise Mr. Gerace what, in our opinion, the Division has a right to do and what it does not have a right to do.

In that regard, I "resent" the implication of the coercive threat that is contained in your remarks as one in which you are attempting to create an intimidating atmosphere so as to force Mr. Gerace to forego what we have advised him are his rights.

MR. FORTIER: Mr. Katz—

MR. KATZ: Let me finish.

Incidentally—off-the-record.

(Discussion held off-the-record.)

MR. KATZ: I want one thing to be absolutely crystal clear. Neither Mr. Gerace nor Local 54 nor I, as counsel, in any way, shape, or form are refusing to cooperate. On the contrary, we are happy to give you any and all information that you desire and to answer any and all questions which you may have.

Mr. Gerace has driven an hour and forty-five minutes this morning to get here from Atlantic City fully prepared to cooperate and to testify. I have driven forty-five minutes to get here fully prepared to observe Mr. Gerace participating and testifying. The determination as to whether or not you are going to ask him questions is your determination, not ours.

I state on the record President Gerace will answer your questions, will cooperate, will give you any and all information which you seek in regard to any appropriate aspect of the functioning of Local 54 and its dealings in the casino-hotel industry and in regard to any aspects of the people who work for or on behalf of Local 54 or in regard to any other matter of relevance.

So if the determination as to whether you conduct this interview is your determination, Gerace is here prepared to answer.

Now, I know that you have stated on the record that you decline to conduct an interview unless counsel for Local 54 and Mr. Gerace gets out of the room. Since I have no intention of getting out of the room, it is my understanding that you decline to conduct the interview. To that end, I want the record and those who consider this transcript to fully understand that this is not a new issue. I have treated, begged, and treated your colleagues—although this is the first time I've had the pleasure to be with you, Mr. Fortier—am I pronouncing that right?

MR. FORTIER: Yes.

Mr. KATZ: But I have in my prior contact with your colleagues posed to them my extreme reservation concerning the unique procedure that you are establishing.

So that the record is clear, you should know that this issue of whether or not you would refuse to conduct an interview if counsel were present first arose in August of 1980 in response to the Division's request to interview Robert Lumio who is an officer of Local 54. In response to that request, we had a twofold problem. One was really a problem. One is justice procedural issue or this issue of basic constitutional rights.

Mr. Lumio, unfortunately, is beset by pernicious leukemia and as a result the determination of whether he should or should not be interviewed in the absence of counsel has been deferred as a result of his doctor's position as to what he could engage in and what he could not engage in.

However, during the period from August of 1980 up until this very minute, I have by letter and by telephone conversation repeated times commencing with my conversation prior to September 3rd, 1980, with Mr. Schwartz and following into correspondence of September 3rd, 1980, to Mr. Eugene Schwartz and thereafter with cor-

respondence to Mr. Eugene Schwartz and correspondence to the Director of the Division, Mr. Brown. I again and again stated that in my review and understanding of the Casino Control Law and any relevant law that there is no basis for the Division to arrogate to itself the procedure of requiring that labor officials who are not employees of any casino but are duly elected pursuant to Taft-Hartley and Landrum-Griffin law officials of their unions submit to under oath private questioning without their attorney being present. We have concluded that there is no such basis in your law and that on the contrary the implications of your law would strongly indicate that you have no right to do that.

For example, the Casino Control Commission is specifically given the right under the law to utilize the facilities of the grand jury system and the facilities of the grand jury system contain within them a statutorily created procedure under which questioning may be conducted of witnesses subpoenaed or directed to appear before the grand jury and the attorney for that particular person is not allowed in the room and may be required to wait outside. It seemed to us that what somebody in this maze of bureaucracy has done is to create its own grand jury system without benefit of the State Legislature.

Accordingly, we concluded that you do not have the right to impose as a condition of questioning the requirement that the questioned person's attorney not be present.

However, recognizing as we do the frailties to which any lawyer or lawyers can be subjected and the fact that at very best law is an art, not a science, we asked Mr. Schwartz, Mr. Brown, and Mr. Fortier, you, for guidance in some way, shape, or form. We said upon what statutory or other basis do you rely for having formulated the requirement that you refuse to question Mr. Gerace or Mr. Lumio or any other union official unless his or her attorney gets out of the room and leaves him alone with your detective sergeant and Court Reporter and you.

MR. FORTIER: Mr. Katz, I'm trying to give you as mucy leeway as possible on the record.

MR. KATZ: You wanted my position. I'm stating my position.

Listen, Ken, I don't want to engage in an argument with you, but you have said that this transcript is going to be examined by somebody. I want whoever examines it to be—

MR. FORTIER: Okay.

MR. KATZ: —to be hit by the fact that we're not refusing to cooperate. This is almost a catch-twenty-two sort of thing.

MR. FORTIER: I think you've made the point very clear. The only thing I want to point out is I was not here in the year 1980 so I really can't respond to some of the things of prior correspondence.

MR. KATZ: That's okay.

I would like to for purposes of the record direct whoever is going to review and make a determination of this their attention to the fact that your file should reflect a conversation between Mr. Schwartz and me prior to September 3rd, 1980; a letter from me to Mr. Schwartz of September 3rd, 1980; and thereafter an entire series of letters of, at least, three to five letters from me to Mr. Schwartz and/or Mr. Brown—copies went to Brown for a long period of time—in which in every letter I said please tell me as a member of the public and as an attorney who wants to do the right thing where you find the basis for this peculiar procedure that you are attempting to impose as a condition of asking Mr. Gerace questions.

I think the record should reflect—you are looking very impatient so I won't go into each date—the record should reflect in not one of the answers is there a response to my question.

If Mr. Schwartz also reduced our conversations to memos in your file, your file conversation memo should reflect that during not one of them would he give me an

answer. Here I stand eight months later after having first posed the question with your colleagues still having refused to give me an answer to it.

Now, under all of those circumstances for you to then say that you're going to conclude that Gerace is not cooperating seems, to me, to be little short of an affront. I say that respectfully, affectionately, and without attempting to cause chaos in your minds.

I want to conclude by saying if you can show me how in any way, shape, or form where my legal advice is incorrect, I will certainly reconsider. I want you to know that we have responsibly had a number of people working on this. We've had a memoranda done for our own internal use. Nobody has indicated to us any conceivable area in which we are incorrect or any conceivable area in which you have the right to impose this requirement.

Let me state Mr. Gerace is here. He'll answer any appropriate question you put to him starting right now at 10:36 a.m. on Monday, March 16th, 1981, but I do not propose to exit from the room. So the determination as to whether you will ask him a question is yours.

MR. FORTIER: Thank you very much.

If I can just respond just briefly, in the course of your comments you mentioned that I was somewhat creating a coercive atmosphere by telling the possible consequences of someone not participating in an interview. Just for the record, it was not meant to be coercive in any way. It was not my intent. I was just trying to be up front and frank so that no one was misled as to what can possibly happen.

MR. KATZ: Ken, Frank has a responsibility to nine thousand people to represent their interests and he also has a responsibility to follow the advise of counsel. For you to then say to him if you follow the advice of counsel there is a possible that we, the Division, may put into jeopardy your right to function on behalf of the representational interests of the workers who comprise your membership is inherently coercive.

MR. FORTIER: Mr. Katz, I was only putting on the record that I had no intent in that regard whatsoever. Although technically I consider it a matter of semantics as to whether who will or who will not cooperate, I will put it to you this way.

At this point I would like to begin asking Mr. Gerace questions regarding the registration of Local 54. However, you, Mr. Katz, will have to step outside the room before I can ask those questions.

MR. KATZ: You may ask Mr. Gerace any and all questions you want. I will remain in the room.

MR. FORTIER: It is our position, then, that we will not—it is our position that it is a failure to cooperate on the part of Mr. Gerace due to the fact that through his failure to cooperate on the part of—

MR. KATZ: By following his attorney's instructions?

MR. FORTIER: Following Mr. Katz if he doesn't want to.

Mr. Gerace, would you ask your attorney to leave the room?

I'll put that on the record. Apparently you will want to speak.

MR. KATZ: Once you ask Mr. Gerace to respond on the record, you have opened the interview and then you'll have to ask him the rest of the questions, which is okay with me.

I really wish—I can't understand the reason for this.

MR. FORTIER: Our position is that you have to leave the room if we can continue with the interview. I think you know that that's the position and that's where we stand.

MR. KATZ: Can you tell me the reason for getting your lack of statutory basis? From a policy point of view, what is the reason?

MR. FORTIER: Mr. Katz, I'm really not here—I don't feel I have to give you any reason.

Rather than even getting into that argument, the position is that your client will not answer questions unless you leave the room. Our position is we'd like to ask questions, but we cannot ask them unless you leave the room. I think the record now is complete with everything. We have statements.

MR. KATZ: You just misstated something.

MR. FORTIER: If I did, it wasn't intentional.

MR. KATZ: I'm certain it wasn't.

Our position is that Mr. Gerace will answer questions. Your position is that you will not ask him questions unless I leave the room, correct?

MR. FORTIER: Yes. Our position is that the interview cannot continue with you in the room, although technically it has not even begun. I would like to ask questions, but I cannot do it with you here. That's our problem.

MR. KATZ: Let me ask one more question, and we'll let it go. Can you tell me why?

MR. FORTIER: I am not going to tell you why. There's no judge here. There's really no point unless there is a legal authority here to decide it.

MR. KATZ: We're making a transcript that someone is going to read. I have a right to inquire why. Why are you taking this position?

MR. FORTIER: The position is you won't leave. That's clear on the record.

Just to make sure that I am being accurate, you will not leave the room so that I can ask questions of Mr. Gerace.

MR. KATZ: You can ask questions while I am here unless you tell me why you won't. But nobody has ever told me why. Honestly, Ken.

MR. FORTIER: Our position is that we have the authority.

MR. KATZ: Tell me where.

MR. FORTIER: Just to show the reverse, you allegedly have authority. When you talked to me over the

phone, I said we have authority as to why we cannot do this and you were going to send me the memo and—

MR. KATZ: You are a public attorney. We are members of the public looking to you for guidance. Would you please tell me on what basis you claim this right and why you claim it? In other words, tell me the statutory or other basis.

MR. FORTIER: The basis is within the Casino Control Commission Act.

MR. KATZ: I reviewed it and I can't find it.

MR. FORTIER: That will be the end of the transcript. Thank you.

Please, I do not have the statute in front of me and—

MR. KATZ: I have the statute. I'll be happy to give you the statute if you can find it.

MR. FORTIER: This will be the end of the interview. Thank you.

MR. KATZ: I would like to continue this further.

MR. FORTIER: Please.

MR. KATZ: You're cutting me off?

MR. FORTIER: Exactly.

MR. KATZ: How long should Mr. Gerace sit here until you determine whether you are going to ask him questions?

MR. FORTIER: We have already determined to ask questions and you won't leave.

That's the end of the transcript as far as I am concerned.

(Whereby, the discussion adjourned at 10:40 a.m.)

CERTIFICATE

I, CAROLYN CUMMINGS, a Certified Shorthand Reporter and Notary Public in and for the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony taken at the time and place hereinbefore mentioned.

/s/ Carolyn Cummings
CAROLYN CUMMINGS
C.S.R.

Date: 3-18-81

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT
CN 047
Trenton, New Jersey 08625

Robert Lumio
Secretary/Treasurer
Local 54
200 North Texas Avenue
Atlantic City, New Jersey 08401

Dear Mr. Lumio:

Please be advised the Division of Gaming Enforcement's investigation is still pending regarding the registration of Local 54 with the Casino Control Commission. As part of the investigative process, the Division has deemed it necessary to interview you regarding certain aspects of your union's registration and qualifications to represent licensed casino employees. Therefore, please accept this letter as a formal request for your presence at Division headquarters in Trenton on Thursday, April 30, 1981 at 10:00 a.m. for the interview. If I do not hear from you in this regard, I will assume that the date and time is acceptable. The interview will be under oath and transcribed. For the purposes of this interview, an attorney of your choosing may be present although none is required.

Looking forward to seeing you on the above date.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Kenneth Fortier
KENNETH J. FORTIER
Deputy Attorney General

KJF:sm
cc: Bernard Katz, Esq.

CERTIFIED MAIL

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
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Philadelphia, Pa. 19102
215-KIngsley 6-4183

April 24th, 1981

[CERTIFIED MAIL #425793-RRR]

Kenneth J. Fortier,
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
Division of Gaming Enforcement
CN 047
Trenton, NJ 08625

In Re: Robert Lumio

Dear Mr. Fortier:

This letter will confirm the conversation which I had on April 23rd, 1981 with "Sheila" of your office. Your letter [undated] requesting an interview with Mr. Lumio on April 30th, 1981 was received at the Union office and a copy was received at my office. Unfortunately and regretably, Mr. Lumio is in the hospital and we have absolutely no idea of what future course his condition will take. Under any circumstances, he is certainly unable to participate in an interview at the present time. You may feel free to verify these statements, either with the hospital or with Mr. Lumio's attending physician.

Incidentally, we are gratified by the change of position reflected in your letter, in which you note that you will now allow an attorney representing the interviewee to be present during the procedure.

At such time as Mr. Lumio is able to participate in the procedure requested by you, I shall be in touch with you further. Thank you for your cooperation.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By BERNARD N. KATZ

BNK/k
UIW/SIU

[SEAL]

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF GAMING ENFORCEMENT
CN 047
Trenton, New Jersey 08625

April 30, 1981

Bernard N. Katz, Esq.
Meranze, Katz, Spear and Wilderman
Twelfth Floor
Lewis Tower Building
N.E. Cor. 15th & Locust Street
Philadelphia, Pennsylvania 19102

Re: Robert Lumio

Dear Mr. Katz:

This is to acknowledge receipt of your letter dated April 24, 1981. Unfortunately, I was out of the office and did not receive it until after I spoke with you by telephone on Tuesday, April 28, 1981, thereby necessitating this second communication. I do not know why you find even the most minimal request for cooperation a near impossibility, but even if I had read your letter prior to speaking to you, I still would not have known for certain which hospital Mr. Lumio was in or who his present attending physician was. As I am sure you are aware, it is not uncommon to change attending physicians or for hospitalization to occur in the place of debilitation. Before I attempted to verify the facts as you suggest in the manner you suggest, I must be certain of each before I send someone to Philadelphia. Notwithstanding your opinion, the information previously provided to the Division does not adequately reflect the degree of certainty required.

Additionally, your cooperation with the Division thus far certainly has not lent itself to the suggestion you would have advised us promptly of any change. I believe it was March 10, 1981 that we spoke and you agreed to provide me with some assurance of Mr. Lumio's continued inability to appear for an investigative interview, yet I have not heard from you in that regard until now. I can only reluctantly assume that if I had not taken the liberty of scheduling an interview with Lumio directly, I would not have heard from you. Also, how you can criticize me for not knowing your client's attending physician, when you did not even know yourself, is beyond me. But be that as it may, Mr. Katz, we are both attorneys and we are both professionals. We are also members of the New Jersey bar. In New Jersey, there is a mutual respect between attorneys for these reasons alone if for no other. Therefore, I ask that you maintain the same degree of professionalism that any New Jersey attorney would extend to you. Your tone and attitude on the telephone is both unprofessional and unbecoming a New Jersey attorney. I do not intend to become accustomed to your personal approach to advocacy, nor do I intend to act accordingly unless left no alternative. We are simply adversaries, not enemies.

In the spirit of mutual respect, I am writing to you primarily because of what I perceive as a misunderstanding in the second paragraph of your letter. Please be advised there has not been a change in our general position towards investigative interviews and the right of an attorney to be physically present. An indulgence has been granted for the purposes of this particular interview with this particular interviewee. The established

policy still remains in effect. I am certain I have made myself clear without more.

Very truly yours,

G. MICHAEL BROWN
Director

By /s/ Kenneth Fortier
KENNETH J. FORTIER
Deputy Attorney General

KJF:sm

LAW OFFICES
MERANZE, KATZ, SPEAR AND WILDERMAN
Twelfth Floor
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Philadelphia, Pa. 19102
215-KIngsley 6-4183

May 15, 1981

CERTIFIED MAIL—RRR

Kenneth J. Fortier, Esq.
Deputy Attorney General
Division of Gaming Enforcement
Department of Law & Public Safety
State of New Jersey
Trenton, New Jersey 08625

RE: Robert Lumio and Local 54, HRE

Dear Mr. Fortier:

I received your letter of April 30, 1981 sometime last week and, frankly, was puzzled by its contents. I simply could not understand why you sent it; nor—in view of what I had thought was an amiable conversation—could I understand the rather hostile "lecture" and your reference to yourself as an adversary.

Accordingly, your letter sat on my desk while I puzzled over whether to respond and correct the inaccuracies—whether to report again on the distressing deterioration of Mr. Lumio and whether to express my amazement that, on one hand, you indicated a change in position concerning the right of counsel to be present during an interview and then, in your April 30 communication, you state that you have not changed your policy; but that: "An indulgence has been granted for the purposes of this particular interview with this particular interviewee."

I have no intentions, at this juncture, of rebutting or responding to your statements seriatum. We have now had brought to our attention the letter, under printed date of May 11, 1981, to the Casino Control Commission from your office, seeking certain punitive action and making wholly unwarranted accusations and statements. Apparently the contents of this letter were released to the public media prior to a copy of the communication's being released to Local 54 or to me. The unfair attempt to conduct a public media condemnation needs no elaboration—obviously, your April 30, 1981 letter was sent as part of that undertaking.

Suffice it to say that the record should reflect that this office has offered to cooperate with your Division at every stage of your activities. Your perturbing denial of these facts is only exceeded by your distressing refusal to recognize the dire condition of Mr. Lumio. I trust that, by this time, you have satisfied yourself by verifying his condition with Dr. Viner, whose name I have supplied to you and your colleagues on several earlier occasions.

Very truly yours,

MERANZE, KATZ, SPEAR
& WILDERMAN

By: BERNARD N. KATZ

BNK:aw
UIW/SIU

Office - Supreme Court, U.S.
FILED
MAR 16 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR APPELLANTS

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Dated: March, 1984

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Appellants,

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR APPELLANTS

Reply to Local 54's Statement of the Case

In their brief and supplemental appendix, the Hotel and Restaurant Employees and Bartenders International Union Local 54 *et al.* (hereinafter referred to as "Local 54") call the Court's attention to certain background relating to the State's investigation of the union. The Appellant Division of Gaming Enforcement (hereinafter referred to as "the Division") had deemed these matters to be largely irrelevant to the legal issues before this Court. Nevertheless, in view of Local 54's treatment of this material, certain ambiguities and omissions should be clarified.

First, Local 54 suggests that Section 86(b) of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86(b) (West Supp. 1983-1984) (J.S. App. 248a),[1] which disqualifies an individual for failing to provide information required by the Act, is somehow "central" to this case. Local 54 Brief at 3. But the disqualifications found by the Casino Control Commission (hereinafter referred to as "the Commission") were not based upon Section 86(b); rather, the president and a member of the executive committee of Local 54 were disqualified for operating their union under the influence of organized crime in violation of Section 86(f) (J.S. App. 171a-178a), and a union agent was disqualified on the basis of his conviction for extortion while acting as a public official, which constituted a disqualifying criterion under Section 86(c) (J.S. App. 193a-196a).

[1] Throughout this reply brief, references to the Joint Appendix to the Jurisdictional Statements will be given in the form "J.S. App. 1a" etc. The Brief and Supplemental Appendix for the Appellees Local 54 *et al.* will be referred to as "Local 54 Brief" and "Local 54 Supp. App." respectively. "Division Brief" will denote the Brief for the Appellants Division of Gaming Enforcement *et al.*

No official of Local 54 has ever been disqualified for a failure to cooperate with the Division's investigation.[2]

Second, Local 54 chronicles at some length the unfortunate illness of Robert Lumio, the union's former Secretary-Treasurer, extending through the period of the Division's investigation and concluding with Lumio's death in June 1981. Local 54 Brief at 5-7. It does not follow from this background, however, that it was inappropriate for the Division to make efforts to verify the fact and extent of Mr. Lumio's medical problems, to seek to interview him at such time as his health permitted, or ultimately to object to his qualifications on a variety of grounds (see Plaintiffs' Exhibit 2). It should be noted that the basis for one of the disqualifications alleged by the Division with regard to Mr. Lumio—that he had numerous documented associations with individuals involved in organized crime—was ultimately sustained by the Commission (J.S. App. 143a, 148a-149a, 151a-152a, 155a-156a).[3]

Third, the union implies some impropriety in the procedure by which the Division sought to conduct investigative interviews of certain officers of Local 54 without the continuous presence of counsel, but with counsel available for consultation outside the interview room. Local 54

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[2] The Division did, in its initial report to the Casino Control Commission, allege what it viewed as violations of Section 86(b) by two officers of Local 54 (Plaintiffs' Exhibit 2). This issue was deleted prior to the Commission hearing, however, thus no factual determination on the question has ever been made.

[3] Although Lumio's death prior to the Commission hearing had rendered the question of Lumio's own disqualification moot, information concerning Lumio was nonetheless considered by the Commission to the extent such information was germane to the disqualification of other officials of Local 54 (see J.S. App. 154a-156a).

Brief at 5-7; Local 54 Supp. App. at 1a, 46a. Based in part on the practical consideration that the presence of advisors to witnesses might unduly encumber an investigatory proceeding, this Court itself has upheld a procedure virtually identical to that proposed by the Division herein, in the context of civil investigations by a state fire marshal. *In re Groban,* 352 U.S. 330 (1957). *See also Hannah* v. *Larche,* 363 U.S. 420 (1960); *Anonymous* v. *Baker,* 360 U.S. 287 (1959); *cf. Minnesota* v. *Murphy,* 52 U.S.L.W. 4246, 4247 n. 3 (U.S., Feb. 22, 1984) (probationer had no federal right to have attorney present at meeting with probation officer). The Division's investigatory procedures have been specifically approved by the New Jersey courts as well. *In re Tufi Application,* 182 N.J. Super. 631, 642-643, 442 A. 2d 1080, 1086 (App. Div. 1982).

As a final matter, and contrary to any impression which might otherwise have been created, it is not beyond question that Frank Gerace, the president of Local 54, would have submitted to a Division interview *but for* the Division's insistence on following its established investigative procedures. See Local 54 Brief at 6-7. What is certain is that it ultimately required a grant of immunity from criminal prosecution to secure Mr. Gerace's pre-hearing deposition testimony (see J.S. App. 203a), and that when called as a witness by the Division at the public hearing before the Commission, Mr. Gerace declined to provide any substantive information, instead invoking his Fifth Amendment privilege against self-incrimination (J.S. App. 166a).[4]

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[4] During this period of time Mr. Gerace was represented by separate counsel, who assertedly advised him not to testify without immunity because Gerace was then the subject of a federal grand jury investigation (J.S. App. 132a, 168a).

In sum, as noted above, the Division considers the detailed factual background concerning its investigation of Local 54 to have little bearing on the question before this Court, *i.e.* whether N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a) is preempted by federal labor law. Nevertheless, to the extent such matters may be relevant, the complete record demonstrates that the Division's investigation of Local 54 and its officials, while sufficiently thorough to comport with the public interest, was not unfair, unreasonable or otherwise improper.

Reply to Local 54's Argument

I. Section 93 of the New Jersey Casino Control Act is not preempted by Section 7 of the National Labor Relations Act.

As reflected in their brief, the major premise of Local 54's argument is that Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976) (J.S. App. 235a), absolutely protects employees' choice of bargaining representatives from any state interference, and that *Hill* v. *Florida*, 325 U.S. 538 (1945), controls the Court's decision of the present case. This reply will confine itself to addressing the most significant errors in Local 54's analysis.[5]

At the outset, the Division accepts the principle that in situations where Congress has so ordained, conflicting state enactments must yield to federal law without regard to the relative importance of the state interest involved. Indeed, the Division has never contended otherwise. See

[5] As to all other issues, the Division will rely on its main brief on the merits.

Division Brief at 15-16. What we do contend, however, is that the depth of the State's interest in regulating certain conduct is of crucial import in determining whether Congress actually intended preemption of the state action in the first place where, as here with regard to Section 7 of the NLRA, the federal statute is completely devoid of explicit congressional direction as to its preclusive effect. Under such circumstances, prevailing notions of federalism dictate that the more compelling the State's interest in regulation as an exercise of its historical police powers, the less likely it becomes that Congress would preclude, merely by implication, the State's ability to act. This view, we submit, is the animating principle behind the "deeply rooted state interest" test set forth in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243-244, 247 (1959), and is fully consistent with the Court's most recent formulations of the preemption doctrine in the labor field. *See e.g., Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172, 3176-3177 (1983); *Local 926, Int'l Union of Oper. Eng.* v. *Jones*, 103 S.Ct. 1453, 1458-1459 (1983).

Local 54's theory that Section 7 of the NLRA is absolute, and itself constitutes compelling congressional direction as regards state preemption, ignores certain fundamental facts. In the first place, as pointed out by Justice Frankfurter in his dissent in *Hill*, there is not a word in Section 7 or any other part of the NLRA which expressly bars a State from doing anything; employees' rights of organization receive explicit protection only from interference by *employers*, under Section 8 of the Act. 325 U.S. at 558-560. In effect, a congressional intent to preempt state interference with employees' Section 7 rights was simply read into the NLRA by the *Hill* majority. See 325 U.S. at 542; *id.* at 545 (Stone, C.J., concurring in part).

The Division is not arguing herein that Hill was wrongly decided on its facts, and the Court need not so hold. Our position, rather, is that Section 7 embodies what is at most an *implied* congressional preemptive intent, of intrinsically uncertain scope, so that preclusion of the type of general state legislation at issue in *Hill* does not necessarily dictate a corresponding bar to a law such as Section 93 of the Casino Control Act. The validity of this approach is confirmed in *DeVeau* v. *Braisted*, 363 U.S. 144, 152-153 (1960), in which Justice Frankfurter unequivocally stated that "the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" and that the real question presented by such a case is whether "Congress, with a lively regard for its own federal labor policy, [would] find in this state enactment a true, real frustration, however dialectically plausible, of that policy."[6]

As a second consideration, Local 54's theory fails to account for the fact that, even in the *Hill* case itself, Chief Justice Stone, in an opinion concurring in part, indicated

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[6] *DeVeau* also provides the definitive response to the suggestion of Local 54 that, in evaluating the preemptive effect of Section 7 of the NLRA, this Court should not consider congressional actions subsequent to *Hill*, *i.e.* Congress' approval of the Waterfront Compact in 1953 and passage of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"):

> It would misconceive the constitutional doctrine of preemption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, *heedless of the light that Congress has shed for our guidance.* [363 U.S. at 153 (emphasis added)].

that the preemptive reach of Section 7 of the NLRA was not without its limits:

> I can find nothing in the National Labor Relations Act or its legislative history to suggest a Congressional purpose to withdraw the punishment of fraud or violence, or the violation of any state law otherwise valid, from the state's power merely because the state might subject the business agent of a labor union, who violates its law, to imprisonment, which would prevent his functioning as a bargaining agent for employees under the National Labor Relations Act. [325 U.S. at 544-545].

But the very recognition of an implied exception to the preemptive scope of Section 7 in an area of significant state interest suggests, as the Division urges, that other exceptions may be found where a State's interest is equally compelling.

Third, Local 54's argument entirely fails to take into account the fact that, between 1945 (when *Hill* was decided) and the present, this Court's own approach to preemption evolved from one weighted heavily in favor of federal preclusion to one amenable to the concurrent exercise of state regulatory authority.[7] As an example, in *Hill* itself, the Court regarded the mere existence of Section 7 of the NLRA as sufficient justification for ousting the State's legislation. 325 U.S. at 542. An identical ap-

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[7] *See generally* Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975). Indeed, one commentator has specifically attributed the development of the law of preemption in the labor field to the time sequence in which the key issues came before the Court. Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1340 (1972).

proach to preemption was followed in *Amalgamated Ass'n of Street Employees* v. *Wisconsin Employment Rels. Bd.*, 340 U.S. 383 (1951), relied on so heavily by Local 54.

A transformation occurred in *DeVeau* v. *Braisted, supra,* in which Justice Frankfurter rejected any such absolutist view of preemption, finding instead that "[t]he doctrine of pre-emption does not present a problem of physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers."[8] 363 U.S. at 152. In seeking to reconcile the operation of Section 8 of the Waterfront Commission Act with Section 7 of the NLRA, 363 U.S. at 152-153, Justice Frankfurter was employing the approach which has been followed by this Court in its most recent pre-emption decisions, *see, e.g., Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 622-626 (1984), and which should be followed in the present case.

Finally, Local 54 expends some effort in attempting to demonstrate that Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (J.S. App. 236a-237a), is really irrelevant to this case. At no point, however, do they explain why the more general provisions of Section 7 of the NLRA should take precedence over the later-enacted and much more specific terms of Section 504(a) of the LMRDA, which the union agrees do not preempt concurrent state regulation. Nor does Local 54 explain why Congress would take the self-contradictory action of affirmatively preserving in Section 603(a) of the LMRDA, 29 U.S.C. §523(a) (1976), state regulation which, at the same time, was rendered impermissible by another pro-

[8] This analysis echoed in its terms Justice Frankfuter's dissenting opinion in *Amalgamated Ass'n of Street Employees, supra,* 340 U.S. at 403.

vision of federal law. The more reasonable inference to be drawn from the interplay between Sections 504(a) and 603(a) of the LMRDA, and Section 7 of the NLRA, is that the later and more specific terms of the LMRDA—particularly the anti-preemption provisions thereof—should control the more general terms of the NLRA. In so holding, this Court would be following the approach adopted most recently in *NLRB* v. *Bildisco & Bildisco*, 52 U.S. L.W. 4269 (U.S., Feb. 22, 1984), in which the more specific provisions of the federal bankruptcy code were held to authorize employer actions which would have constituted unfair labor practices under the more general provisions of the NLRA.

II. Section 86 of the New Jersey Casino Control Act is designed to prevent organized criminal infiltration and other corruption of the gaming industry, not to prevent vigorous labor representation.

As pointed out in the Division's brief, Section 86 of the New Jersey Casino Control Act (J.S. App. 248a-255a) on its face disqualifies an individual only for criminal or *quasi*-criminal conduct, or for illegal attempts to thwart an investigative inquiry into such conduct. Division Brief at 4-5 & n. 3, 37. At various points in Local 54's brief, the union advances for the first time in these proceedings the assertion that the disqualification provisions of Section 86 actually sweep so broadly as to empower the Commission to bar "any union officer whose militancy is seen as a threat to tourism."[9] Local 54 Brief at 18-19, 28. So

[9] Before the District Court, Local 54 raised two entirely different arguments as to the overbreadth and vagueness of Section

(Footnote continued on following page)

that the record is clear, although declarations of public policy set forth within the New Jersey Casino Control Act do make reference to the promotion of tourism, N.J. Stat. Ann. §§5:12-1(b)(1), (2), (3), (4) and (5) (West Supp. 1983-1984), Section 86 of the Act—as applied to labor officials through Section 93—is designed to implement a totally separate law enforcement objective, namely, the exclusion from participation in the gaming industry of persons having known criminal records, habits, or associations. See N.J. Stat. Ann. §§5:12-1(b)(6), (7), (9), (13) and (15) (West Supp. 1983-1984); *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 321-323 (D.N.J. 1982) (J.S. App. 81a-87a). The notion that union leaders could be disqualified under Section 86 of the Casino Control Act merely for "vigorously champion[ing] the interests of the employees they represent," Local 54 Brief at 19, is unsupportable and spurious.

(Footnote continued from preceding page)

86, both of which were rejected. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 335-338 (D.N.J. 1982) (J.S. App. 115a-122a). These overbreadth and vagueness contentions were not considered by the Court of Appeals, *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger,* 709 F. 2d 815, 833 (3d Cir. 1983) (J.S. App. 37a), and are not before this Court.

III. The otherwise valid operation of Section 93 of the New Jersey Casino Control Act cannot be nullified merely because Local 54 also represents some non-casino industry employees.

The persistent attempts of Local 54 to interpose its non-casino industry members as a shield, to prevent the application of Section 93 of the Casino Control Act to the union's casino industry members, see Local 54 Brief at 4, 21-22, must be unavailing. As a discrete group, non-casino workers would be beyond the reach of Section 93, and could select any individuals they desired to serve as their bargaining representatives. But having voluntarily chosen for their own benefit to ally themselves with a casino industry labor organization and that organization's leadership, the non-casino workers must take the bitter with the sweet. Any contrary rule would produce the anomalous result of permitting all unions involved in the casino industry to immediately and totally nullify the otherwise valid operation of Section 93 merely by absorbing some non-casino members to serve, in effect, as hostages. Should this Court uphold the validity of Section 93, the non-casino members of Local 54 can be expected to take appropriate action in their own best interests, as provided for by federal labor law.

CONCLUSION

For all of the reasons set forth herein and in our brief on the merits, the judgment of the Court of Appeals, holding Section 93 of the New Jersey Casino Control Act preempted by federal labor law, should be reversed.

Respectfully submitted,

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Appellees.

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

POINT I

Abstention under the principles of *Younger* v. *Harris* is appropriate in this case.

Appellees raise two points in response to the Commission's abstention argument, both of which require a brief reply.

Appellees contend that the abstention argument should be rejected because it is not being presented in this Court by co-appellant New Jersey Department of Law and Public Safety, Division of Gaming Enforcement. However, the New Jersey Legislature has seen fit to create two state agencies to regulate casino gaming, and to provide for separate representation of each, *see*, N.J. Stat. Ann. 5:12-54(d) and -55 (West Supp. 1983), and the Casino Control Commission is pressing the abstention argument in this Court. Appellees contend that "[t]he Casino Commission has no interest in delaying . . . adjudication because its proceedings have been completed and therefore will not be interfered with by a decision here" (appellees' brief at 13). The Commission has never had and does not now have any interest in delaying adjudication. The Commission merely seeks vindication of the abstention argument it has maintained throughout this litigation. It is true that the Commission's adjudicatory hearing, as well as the investigatory and prosecutorial efforts of the Division of Gaming Enforcement, have been completed. However, the Commission has been enjoined from enforcing its remedial order, and thus it is the Commission's process which has been interfered with by the order of the Circuit Court and which would be interfered with by a decision on the merits by this Court.

Appellees' remaining argument is that abstention is inappropriate because their constitutional claims could not be resolved before the Commission. However, the state appellate courts were always available to appellees, on an interlocutory basis or on appeal of right from the Commission's final order, and appellees have in fact appealed to the Superior Court, Appellate Division from the final order and have raised the same constitutional claims presented to this Court. The state appellate courts are bound by the same constitution as the federal courts, and are obviously competent to hear and decide appellees' constitutional claims. *See, Allen* v. *McCurry,* 449 U.S. 90 (1980). The state appellate courts are also competent to grant any stay or other interim relief which may be necessary to preserve the status quo pending appeal. *Cf. Middlesex County Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423, 430, n.15 (1982).

The New Jersey Court Rules provide that on or after the filing of a notice of appeal, or notice of motion for leave to file an interlocutory appeal, from a decision of an administrative agency, a notice of motion for ad interim relief or a stay may be made to the Appellate Division. N.J. Ct. R. 2:9-7 (1984). The rules also provide that applications for temporary relief, stays and emergency orders may be made, with or without notice, to a Justice of the State Supreme Court if a matter is pending in the Appellate Division. N.J. Ct. R. 2:9-8 (1984). There is thus no substance to appellees' argument that absent a federal injunction they would be left without an avenue of interim relief from the Commission's order. For the reasons set forth in the Commission's main brief, the district court should have abstained and allowed the state proceedings to complete their orderly course, including appellees' appeal as of right to the state courts from any adverse agency determination. *See,* N.J. Stat. Ann. 5:12-110 (West Supp. 1983); *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975).

POINT II

Bus Employees v. _Wisconsin Board_ is inapposite to the present matter and utterly fails to support the conclusion that section 93 of the Casino Control Act is preempted by section 7 of the NLRA.

On the issue of preemption, this reply brief will only address the arguments raised in Point II C of appellees' brief, premised on *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951). All other arguments advanced by appellees regarding preemption have been dealt with in the Commission's principal brief.

Wisconsin Board involved a state statute which declared it to be a misdemeanor for any employee of a public utility to engage in a strike or to instigate, induce or encourage a strike. The statute further provided that whenever there was a collective bargaining "impasse" the Wisconsin Employment Relations Board was to select arbiters to "hear and decide" the dispute. 340 U.S. at 387-388. *Wisconsin Board* arrived in this Court on *certiorari* to the State Supreme Court, which had upheld *ex parte* orders of lower state courts permanently enjoining declared strikes against the Milwaukee Electric Railway and Transport Company and the Milwaukee Gas Light Company.[1]

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[1] Even this brief recitation of the operative facts in *Wisconsin Board* demonstrates its fundamental differences from the instant matter. These differences will be detailed below. The Commission therefore feels no compulsion to respond to appellees' charge that the appellants could not differentiate the case and chose instead to "simply ignore that precedent despite the Court of Appeals' strong reliance thereon." (appellees' brief at 33). As will be apparent, the Commission chose rather to focus on pertinent law in its presentation to this Court.

This Court noted that it had previously held, in *International Union of United Auto Workers* v. *O'Brien*, 339 U.S. 454 (1950), that in enacting the NLRA Congress had guaranteed the right to strike and established procedures and limitations governing that right, and had thereby "occupied this field and closed it to state regulation." *See*, 340 U.S. at 390. The Court went on to hold that the Wisconsin statute before it was invalid, explaining:

> The utilities companies, the State of Wisconsin and the other states as *amici* stress the importance of gas and transit service to the local community and urge that predominantly local problems are best left to local governmental authority for solution. On the other hand, petitioners and the National Labor Relations Board, as *amicus*, argue that prohibition to strikes with reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of national labor policy. This, it is said, leads to more labor unrest and disruption of service than is now experienced under a system of free collective bargaining accompanied by the right to strike. The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by this Court. In our view, the questions are for legislative determination and have been resolved by Congress adversely to respondents. [340 U.S. at 397].

Appellees conclude from the above language of *Wisconsin Board* that the balancing test so carefully developed in such cases as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), and *Local 926* v. *Jones*, —— U.S. ——, 103

S. Ct. 1453 (1983), should be discarded in evaluating the constitutionality of section 93 of the Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), and that the compelling state interests which underly section 93 should be ignored. However, *Wisconsin Board* does not establish an exception to the *Garmon* balancing approach. As the *Garmon* Court itself said:

> When the exercise of state power over a particular area of activity threatened interference with clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. [Citing, *inter alia, Wisconsin Board.*] However, due regard for presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but a promotor of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citations Omitted]. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of power to act. [359 U.S. at 243-244].

In *Wisconsin Board,* and earlier in *O'Brien,* the Court had canvassed the language and legislative history of the NLRA, and concluded that Congress had left no room for state enactments limiting the right to strike. In *Wisconsin Board,* the Court also noted that Congress had itself expressly rejected a proposal to restrict that right as it applies to public utilities. 340 U.S. at 390-394. The Court was faced with a statute which completely eliminated the right to strike with regard to workers in public utilities

in Wisconsin and struck down the statute. *Wisconsin Board* is merely an example of a state legislating in an area which has been entirely occupied by Congress and enacting a statute which directly conflicts with national labor policy.

In contrast, in adopting section 93 of the Casino Control Act New Jersey did not enter a field in which Congress had left no room for state enactments and did not contradict national labor policy. As discussed in the Commission's principal brief, in enacting the disqualification criteria of section 504 of the LMRDA, and in approving the compact involved in *DeVeau,* Congress made clear that it was not occupying this field to the exclusion of state regulation. As also previously explained, in *DeVeau,* 363 U.S. at 152, this Court made clear that section 8 of the Waterfront Commission Act, Title 29, N.Y. Unconsol. Laws, Sec. 9933 (McKinney 1974), did not conflict with or seriously impede national labor policy as set forth in section 7 of NLRA, 29 U.S.C. 157 (1973), and the same conclusion must be reached with respect to section 93 of the Casino Control Act.

The principal point of appellees' argument is that preemption is mandated where there is a direct conflict between federal and state enactments. The Commission does not take issue with this assertion. Where Congress has guaranteed the right to engage in an activity, a state statute prohibiting that activity cannot stand. The Commission's point has always been that section 93 does not contradict federal labor policy as embodied in section 7. This is made clear, not by references to cases dealing with the right to strike, but by reference to legislative pronouncements (adoption of section 504 and approval of the compact involved in *DeVeau*) and judicial pronouncements (the *DeVeau* opinion) directly on point.

In fact, appellees themselves concede that section 504 of the LMRDA does not have preemptive effect (appellees' brief at 27), but nonetheless conclude that section 7 of the NLRA preempts section 93. However, the LMRDA was an amendatory readoption of the NLRA. Appellees apparently impute to Congress an intent, evidenced by its adoption of section 504, to allow state enactments establishing additional disqualification criteria for labor leaders, while at the same time precluding all such enactments by readopting section 7.

Appellees later argued (Appellees' brief at 34) that by adopting the LMRDA in 1959 Congress ratified the decision in *Hill* v. *Florida,* 325 U.S. 536 (1945), a decision which appellees interpret as precluding any state legislation which applies qualification criteria to labor union officials. Again, appellees are contending that Congress adopted section 504 as a non-preemptive provision of the LMRDA, thus allowing for state enactments in this area, and at the same time ratified *Hill,* thus precluding all such enactments. In dealing with what they contend is a cohesive national labor policy, it is remarkable that appellees impute such schizophrenic motives to Congress.

Clearly, by enacting the disqualification criteria of section 504, and choosing not to give preemptive effect to that section, Congress allowed for state enactments in the area. On the other hand, some state enactments may well be so broadly and unnecessarily intrusive upon the right to choose representatives that they should be stricken in deference to section 7. However, it is at least manifest that state statutes of this type are not to be discarded based on an absolutist concept of the right to choose representatives, but must be examined on a particularized basis which balances any incidental strictures on the right against the purported state interest. It is difficult to imagine a more circumscribed and justified example of

such a statute than section 93. As Judge Becker said in his dissent below, it is a rare case in which a state statute disqualifying labor leaders can stand, but the present case, like *DeVeau,* is such a case. In any event, the majority of the Circuit Court surely erred in rejecting the statute out of hand, just as appellees now urge this Court to do.

One final point which requires a brief reply is appellees' attack on the section 93 remedy relating to the prohibition of dues collection. It is clear, and the Commission has ruled (A208a-A216a), that the only purpose of section 93 is to remove disqualified individuals from positions of authority within casino industry labor unions. The dues-prohibition remedy is merely a means to that end. The primary issue before this Court is whether section 7 of the NLRA precludes New Jersey from pursuing that end. If the Commission is correct in arguing that New Jersey can disqualify certain casino industry union leaders, the separate issue of the propriety of the dues-collection remedy arises. In *International Longshoremen Assoc.* v. *Waterfront Commission,* 642 F.2d 666, 670-671 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981), the Court noted that the plaintiffs in *DeVeau* had challenged the propriety of the dues-prohibition remedy in section 8 of the Waterfront Commission Act and that this Court, in affirming the dismissal of the complaint, "had necessarily upheld, against a claim of preemption, the validity of the dues-collection prohibition." The *International Longshoremen's* Court went on to uphold the dues-collection remedy against a First Amendment challenge, but that issue is not now before this Court. At any rate, the Commission respectfully submits that the dues-collection prohibition is a reasonable and necessary means of achieving the statutory purpose

of section 93, and that this remedial provision should once again be upheld.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, et al.,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, et al.,
Appellees.

On Appeal From the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* FOR APPELLANTS

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January 10, 1984

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae in support of the appellants, and would show:

I. Interest of Amicus Curiae:

The National Right to Work Legal Defense Foundation is a nonprofit charitable organization formed to provide free legal aid to individual employees who suffer from acts of violence, intimidation,

harassment and coercion resulting from their decisions to refrain from union membership or activities. Additionally, the Foundation assists individual employees who seek to enforce their right to work, freedom of association and other fundamental liberties infringed by compulsory unionism arrangements.

II. Purpose of This Brief:

Individual casino employees have a grave interest in the outcome of this litigation. After a full and fair hearing, a neutral and detached state adjudicative body has decreed that Hotel & Restaurant Employees and Bartenders International Union Local 54, its president and certain officers have "organized crime associations". In accordance with the remedial provisions of N.J. Stat. Ann. 5:12-93, the New Jersey Casino Control Commission prohibited Local 54 from collecting dues from any employee licensed under the Casino Control Act and employed by a casino licensee.

Subsequently, the U.S. Court of Appeals for the Third Circuit held that New Jersey's prophylactic effort to rid the casinos and casino unions of organized crime figures and to protect employees was preempted by the National Labor Relations Act. If affirmed, the Third Circuit's interpretation of the preemption doctrine will:

(1) destroy the delicate balance between federal and state powers in the area of labor regulation in the casino industry;

(2) greatly diminish a state's power to control the infiltration of industries and unions by organized crime; and,

(3) require individual employees to financially support organized crime as a condition of maintaining their employment.

The Foundation does not doubt that appellants will fully argue their interests. However, because their briefs will naturally focus upon the legality of New Jersey's attempt to regulate and administer its casino operations, the Foundation submits that it will properly argue in favor of the interests of the individual employees affected by this decision.

For these reasons, the National Right To Work Legal Defense Foundation requests that this Motion be granted and the annexed brief accepted for filing.

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is contained in the Motion For Leave To File this Brief and adopted herein.

INTRODUCTION OF ISSUES PRESENTED

In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 82-1105 (U.S. Supreme Court cert. granted,

Apr. 18, 1983), this Court will soon face the issue of whether employees who pay a mandatory agency fee can be required to pay for a host of union sponsored political and social causes as a condition of employment. The issue in this case is even more extreme: whether a state is forbidden from protecting employees who are being required, as a condition of employment, to pay dues to a corrupt union, found by a neutral state adjudicative body to have direct links to organized crime.

Congress' relative silence on the particular issue of state regulation of unions involved in the casino industry should not be interpreted as giving organized criminals carte blanche. If the National Labor Relations Act will not protect employees in highly regulated industries from forced financial support of organized crime figures, at least the state which gave birth to the industry should be allowed to do so.

Finally, through the enactment of § 14(b) of the NLRA, 29 U.S.C. § 164(b), Congress has allowed states to impose conditions upon, or prohibitions against, a union's ability to require the payment of dues as a condition of employment. By stopping corrupt casino unions from receiving dues money, the New Jersey legislature is merely utilizing its recognized power under § 14(b).

ARGUMENT

Central to the resolution of this case is the determination of whether Congress intended to preempt New Jersey's regulation of labor unions in the casino industry. This question turns upon a balancing of the relative federal and state interests involved.

> "The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens."

Local 926, International Union of Operating Engineers v. Jones, U.S. , 103 S. Ct. 1453, 1458-9 (1983).

Although any balancing test should recognize that the federal labor policy favors the right of employees to freely choose their bargaining representatives, this policy has never been held to be absolute. In fact, both the Congress and this Court have recognized that where criminals or subversives hold power in a union, the employees' right to choose their representatives is not unfettered and should be curtailed. See 29 U.S.C. § 504 (1976); *DeVeau v. Braisted,* 363 U.S. 144 (1960); 5 U.S.C. § *7120.*[1]

[1] As part of the Civil Service Reform Act of 1978, Congress enacted the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101, et seq. In 5 U.S.C. § 7120, Congress established standards of conduct for labor unions representing federal employees. This section allows the Secretary of Labor to override the employees' choice of representative if there is evidence of corrupt or totalitarian influences in the union. Although the Federal Service Labor-Management Relations Statute differs from the NLRA, there is no doubt that the federal labor statute was patterned on the NLRA. Further, federal employees are guaranteed the right to choose their representatives in a manner similar to § 7 of the NLRA, 29 U.S.C. § 157. To the extent that the Federal Service Labor-Management Relations Statute is the most recent congressional declaration of national labor policy, it should be noted that by enacting 5 U.S.C. § 7120 Congress has clearly recognized limits on employees' organizational and representational rights where there are corrupt influences controlling the union.

In a plurality opinion upholding a bi-state regulatory scheme designed to weed out racketeers from the ports and terminals of New York, which was challenged on preemption grounds, Justice Frankfurter stated:

> "It would misconceive the constitutional doctrine of preemption . . . to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light Congress has shed for our guidance."

DeVeau v. Braisted, 363 U.S. 144, 153 (1960).

It does not overstate the present situation to argue that the interest of the State of New Jersey and individual casino employees is crucial, and far outweighs the interests asserted by Local 54. The State of New Jersey gave birth to the highly regulated business of casino gambling only after promising its citizens that stringent anti-crime measures would be taken to keep the casinos free of corrupt influences. Without the promise of these anti-crime measures, it is safe to say that the citizens of New Jersey would not have sanctioned casino gambling in their state. *Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger*, 536 F. Supp. 317, 321-323 (D. N.J. 1983).

It is well recognized by Congress that gambling should be subject to thorough regulation, if not completely outlawed. In fact, Congress has enacted a number of laws regulating

the interstate aspects of gambling.[2]

Similarly, states which have permitted casino gambling, lotteries or pari-mutuel betting have sought to place the strictest controls upon those activities. Thus, in *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 210 P.2d 852, 854 (1957), the Nevada Supreme Court stated:

> "For gambling to take its place as a lawful enterprise in Nevada, it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this State, but for the entire nation. Organized crime must not be given refuge here through the legitimizing of one of its principal sources of income."

The citizens of New Jersey also recognized the risks involved in legitimizing casino gambling. Among the special protections which the New Jersey legislature mandated was to require that unions and individuals representing casino employees register with a state agency. Further, a neutral and detached state adjudicative body is empowered to investigate these unions and their officers and employees. Finally, as its major remedial power, the state agency can disqualify any corrupt union from receiving dues from employees.

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[2] See, e.g., 15 U.S.C. §§ 1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§ 1082-1083 (1976) (prohibiting gambling on certain ships); 18 U.S.C. § 1084 (1976) (barring transmission of wagering information over interstate wires); 18 U.S.C. §§ 1301-1307 (1976 & Supp. V 1981) (regulating lotteries); and 18 U.S.C. § 1953 (1976 & Supp. V 1981) (barring interstate shipment of gambling paraphernalia).

These remedial provisions of the New Jersey Casino Control Act are not "labor" legislation in the strict sense. These provisions are quasi-criminal anti-racketeering measures, enacted as part of a much larger scheme to regulate an industry which New Jersey voluntarily spawned, but could at any time again prohibit. Unlike the State of Florida's regulatory scheme struck down in *Hill v. Florida*, 325 U.S. 538 (1945), these New Jersey regulations are not directed at unions *per se*.

The New Jersey regulations do not directly interfere with Local 54's activities. They will not stop Local 54 or any other union from representing any employees, either inside or outside of casinos. Local 54 is still free to bargain on behalf of the employees it represents and to administer its contracts. Further, Local 54 can continue to collect dues from the many non-casino employees which it represents. Thus, the statutory sanction of disqualifying Local 54 from collecting dues from casino employees is really only a limited control, designed solely to further the interests of New Jersey and the individual casino employees who need protection from organized crime.

The NLRA gives Local 54 the power to negotiate a union security contract with employers. Thus, the National Labor Relations Act is being used, in effect, to require employees to financially contribute to organized crime affiliates as a condition of continued employment. Although nothing in the NLRA appears to prohibit this sordid situation on its face, there is no justifiable reason for believing that Congress meant to assent to this situation or deny New Jersey the power to police union corruption in a state created industry.

In fact, Congress has given states power to limit a union's collection of dues, through its enactment of § 14(b) of the

NLRA, 29 U.S.C. § 164(b). See *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963). The New Jersey laws at issue herein, and the Casino Control Commission's sanction, are analogous to other states' prohibitions against certain aspects of union security. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949); Colo. Rev. Stat. § 8-3-108(1)(c) (1974) (invalidating union security agreement unless it has been approved by an affirmative vote of three-fourths of the employees in the bargaining unit); Thomas R. Haggard, Compulsory Unionism, the NLRB, and the Courts, 172-190 (1977). New Jersey has done nothing more than outlaw union security arrangements if its neutral adjudicative body determines that the union is corrupt. This regulation is within the spirit and the letter of § 14(b).

CONCLUSION

The opinion of this Court in *DeVeau v. Braisted*, the obvious federal labor policies against organized crime, the strength of New Jersey's interest, and the state's right to limit union security agreements should be interpreted to uphold the regulations which disqualify organized criminals from collecting dues from individuals employed in the casino industry.

Respectfully submitted,

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OCTOBER TERM, 1983

G. MICHAEL BROWN, Director of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY, Division of Gaming Enforcement, State of New Jersey and THOMAS KEAN, Governor, State of New Jersey,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, President Hotel and Restaurant Employees and Bartenders International Union Local 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF NEVADA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

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No. 83-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

G. MICHAEL BROWN, DIRECTOR OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE OF NEVADA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The State of Nevada joins its sister state, New Jersey, in its position that federal law

should not and does not prohibit states from imposing appropriate, though limited, requirements on union officials who represent gaming industry employees. All matters affecting the ability to strictly regulate gaming are of vital concern to Nevada. The Nevada Legislature has stated that a well regulated gaming industry is tremendously important to the economy of Nevada and to the general welfare of its citizens.

> The legislature hereby finds, and declares to be the public policy of this state, that:
>
> . . . .
>
> . . . The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming is conducted honestly and competitively and that gaming is free from criminal and corruptive elements.
>
> . . . Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.

Nev. Rev. Stat. § 463.0129 (1983).

Furthermore, the Legislature has found that, "[i]n the past, attempts have been made by persons whose background is not suitable for association with licensed gaming to gain positions of control in labor organizations representing gaming casino employees in this state." Nev. Rev. Stat. § 463A.010(2) (1979). Consequently, to serve these State interests, the Nevada Legislature has determined that it may be necessary to determine the personal suitability of those who perform certain key functions in representing gaming casino employees in this State. Id. ch. 463A.

A ruling affirming the Third Circuit majority opinion in the instant case could significantly weaken Nevada's ability to protect its vital interests.

I. THE THIRD CIRCUIT MISAPPLIED PREEMPTION ANALYSIS BY MISREADING CONGRESSIONAL INTENT CONCERNING STATE INVOLVEMENT IN LIMITED AREAS OF LABOR RELATIONS.

Nevada joins in New Jersey's argument that the Third Circuit misapplied the preemption doc-

trine by oversimplifying its application in this case. Nevada agrees with the views expressed in Judge Becker's dissenting opinion, and urges this Court to adopt them as controlling in this case. "[F]ederal labor law does not preempt [state] restrictions on the right of casino-industry employees to select certain individuals as union officials." Hotel & Restaurant Employees International Local 54 v. Danziger, 709 F.2d 815, 836 (Becker, J., dissenting) (hereinafter "Opinion below").

If a state attempts to regulate matters actually or arguably protected or prohibited by the National Labor Relations Act (NLRA), then the state regulation is usually preempted. Local 926, International Union of Operating Engineers v. Jones, ___ U.S. ___, 103 S. Ct. 1453 (1983).

> When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of

> the power to act, we refuse to invalidate state regulation or sanction of the conduct. . . . The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

Id. at ___, 103 S. Ct. at 1458-59.

The preemptive scope of federal labor laws is usually not strikingly clear. Congressional intent must be pieced together from its conflicting statements. See, e.g., Garner v. Teamsters, Chauffeurs and Helpers Local Union 776, 346 U.S. 485 (1953). It is not always apparent how much room has been left for the states.

The NLRA grants employees the right to choose their own bargaining representatives. 29 U.S.C. § 157 (1976). This "free choice," however, is not completely unfettered. The Labor Management Reporting and Disclosure Act (LMRDA) contains

specific disqualification criteria. 29 U.S.C. § 504 (1976). Congress has enunciated these disqualification standards to serve the public good by attempting to remove the criminal element from labor organizations. See generally Illario v. Frawley, 426 F. Supp. 1132 (D.N.J. 1977). In fact, all of the federal legislation in the field of labor relations is intended to serve the public good by freeing interstate commerce from burdensome labor disputes. See generally International Union, Local 283 v. Scofield, 382 U.S. 205 (1965); United States v. Brown, 381 U.S. 437 (1965).

But it does not necessarily follow that Congress has intended that the states may not enact other disqualification standards that serve their vital interests. A more reasonable reading of Congressional intent is that states may complement the federal scheme in this area. International Longshoremen's Association v. Waterfront Commission, 495 F. Supp. 1101

(S.D.N.Y. 1980), aff'd in part and rev'd on other grounds, 642 F.2d 666 (2d Cir. 1981), cert. denied, 454 U.S. 966 (1981). Congress has previously acquiesced in bi-state legislation designed to eradicate labor strife in the Port of New York. See DeVeau v. Braisted, 363 U.S. 144 (1960). In light of the unique industry in question here - casino gambling - and its somewhat spotted history, it seems likely that federal labor authorities would welcome a role for Nevada and New Jersey.

As discussed below, Nevada's goal is to strictly regulate its most important industry by having available a mechanism to disqualify key gaming labor officials convicted of various crimes or associated with organized crime. National labor policy is not threatened by these state restrictions. The fact that Nevada and New Jersey can disqualify certain labor officials does not present an "unacceptable risk" to national labor policy. See generally Farmer v.

Carpenters, 430 U.S. 290 (1977) (state court remedies for tortious activity allegedly caused by union conduct not preempted). Consequently, if a state interest is sufficiently compelling, the Supremacy Clause of the United States Constitution does not require invalidating state law respecting gaming employee labor organizations.

II. BECAUSE OF NEVADA'S DEEPLY ROOTED INTEREST IN PROTECTING THE INTEGRITY OF ITS GAMING INDUSTRY, FEDERAL LABOR LAW ON BALANCE DOES NOT PREEMPT LIMITED STATE REGULATION OF GAMING EMPLOYEE UNION OFFICERS.

Nevada has a long and unique history involving gambling. Even prior to Nevada's admission to the Union, gambling was an integral part of life in Nevada. The discovery of gold and silver on the "Comstock Lode" near Virginia City in 1858 created mining towns filled with persons seeking to strike it rich. Gambling became a major activity and a vital component of these early days in Nevada. J. Skolnick, House of Cards 103 (1978).

Following statehood in 1864, the Nevada Legislature legalized gaming in 1869 over the veto of the governor. Securities and Economic Research Division, Nevada Gaming Commission and State Gaming Control Board, Gaming Nevada Style 9 (1977) (hereinafter "Gaming Nevada Style"). The law approved numerous gambling games and imposed license fees, which the counties and the State initially shared equally.

Nevada restricted casino gaming between 1910 to 1931. Neither the outright prohibition that was in effect at the beginning of this period, nor more lenient restrictions later, were strictly enforced. Id. In 1931, the modern era of gaming control began. The Nevada Legislature again legalized all forms of gaming (except lotteries), and called for disposition of license fees to the State (25%) and to the counties (75%). Act of March 19, 1931, ch. 99, 1931 Nev. Stat. 165. County officials were responsible for licensing, and for monitoring compliance with gaming laws.

Among the factors contributing to the return to "wide-open" gaming were a desire to control the widespread illegal gambling occuring under previous laws, Gaming Nevada Style, supra, p. 9 at 10, and "the hope that . . . [legalized gaming] would enhance business[,] which had suffered severely in the nationwide depression." Id. (quoting R. Zubrow, R. Decker & E. Plank, Report to the 1960 Legislature (hereinafter the "Zubrow Report")). At that time, Nevada had fewer than 100,000 residents, most of whom were employed in mining, agriculture, and the railroads. Economic Research Associates, The Role Of Gaming In The Nevada Economy, An Update V-I (1983) (hereinafter "The Role Of Gaming"). Revenue from tourism was miniscule; gaming was an activity enjoyed primarily by local residents. Id.

The Nevada Legislature also hoped to raise State tax revenues.

> "[I]t was recognized that legalized gambling would provide an additional source of tax revenue and needed relief from

> other taxes. As stated by the Nevada State Journal on January 18, [1931] prior to passage of the bill, '[T]here is strong sentiment, particularly in Southern Nevada, that some state or municipal revenue should be derived from the games which now run on every hand with apparent sanction of public sentiment. * * *'"

Gaming Nevada Style, supra, p. 9 at 10 (quoting the Zubrow Report, supra, p. 10.

Following the 1931 Act, there was no immediate burst in gaming revenue. From 1931 to 1941 gaming revenue increased only 49%. Id. During the next three year period, however, gaming revenue increased another 56%. Id. Then, in 1945, 1946 and 1947, gaming increased 19% each year. Id. Nevada's economy was nurtured by and gained strength from the gaming industry.

During this same period, however, elements of organized crime began to view Nevada's gaming industry as a unique opportunity for exploitation. House of Cards, supra p. 8, at 111-18. Nevada's response to protect its interests was to provide more mature and vigorous control mechanisms.

In 1947, primary license responsibilty (including the power to revoke a license) was passed to the State authorities acting through the Tax Commission. In 1955, the State Gaming Control Board was created as a separate arm of the State Tax Commission. The Board's function was and is to investigate applicants for licensing and to prosecute violations of applicable regulations. Act of March 29, 1955, ch. 429, 1954-1955 Nev. Stat. 883. In 1959, a new State agency, the Nevada Gaming Commission, was created as the final arbiter on licensing and disciplinary matters, thus removing the Tax Commission from the gaming arena. Act of March 30, 1959, ch. 318, § 4, 1958-1959 Nev. Stat. 427.

Over the last thirty years, the gaming industry has become the preeminent force behind Nevada's development. All indicators of Nevada's well-being are tied to the growth and performance of the gaming industry. Nevada has

the highest tourism dependancy of any state in the nation, and 80% of state tourism is directly attributable to the availability of legalized gaming. The Role Of Gaming, supra p. 10, at II-1, VI-28, 29. Sixty percent of all jobs in Nevada are directly or indirectly supported by the gaming industry. Id. at II-1, V-23. License fees on gross gaming revenue and casino entertainment taxes comprised 23.9% of the State's general fund in 1951-53, and increased to 52.3% for 1981-82. Id. at IV-10. If sales tax revenue attributable to gaming tourists and other economic activity related to gaming are considered, gaming supports approximately 80% of the State budget. Id. at IV-2. Hence, it is not surprising that the Legislature has seen fit to provide mechanisms regulating all aspects of gaming.

Nevada's vital interest in gaming has been recognized by the federal courts as well as the Supreme Court of the State of Nevada. See Marshall v. Sawyer, 301 F.2d 639 (9th Cir.

1962) (Pope, J., concurring); Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957); State v. Glusman, 98 Nev. 412, 651 P.2d 639 (1982).

The Glusman case involved a constitutional challenge to a provision of Nevada law that gave the Nevada Gaming Commission the discretion to call forward a person doing business on the premises of a licensed gaming establishment for a determination of suitability to be associated with a gaming enterprise. The court upheld the statute as a reasonable exercise of the State's police power. Id. at 423, 651 P.2d at 646. In describing the "unique setting" of the Nevada gaming industry, the Nevada Supreme Court noted:

> The peculiar nature of the gaming industry presents numerous concerns and problems of control, the resolution of which must be readily available to cognizant government authorities of this state. It has been clearly recognized by our earlier decisions that gaming longevity and vitality, under continuing state authority, are dependent upon effective control mechanisms which will assure appropriate

> deference to the health, safety and welfare of the citizenry.

98 Nev. at 417-18, 651 P.2d at 643.

The Court of Appeals for the Ninth Circuit has stated: "[I]n a very real sense, . . . the State of Nevada itself is in the gambling business, and its continued maintenance of that institution is vital to the State's life and its economy." Marshall v. Sawyer, 301 F.2d at 648 (Pope, J., concurring). Nevada has no opportunity to invoke the jurisdiction of the National Labor Relations Board to disqualify notorious labor officials, but rather must rely on its police power, reasonably exercised, to protect its most vital interest.

Chapter 463A of the Nevada Revised Statutes requires registration and permits investigation into the individual suitability of key personnel in gaming labor organizations. It is one further mechanism in Nevada's regulatory evolution. It is a reality that in today's labor-management relationship, labor organi-

zations have an active role in the terms and conditions of employment, work schedules, lay-off procedure, fringe benefits, and other provisions of collective bargaining agreements. N. Levin, Successful Labor Relations 7-13 (1978). The Nevada Legislature enacted NRS chapter 463A to deal with the corruptive elements in labor unions that could endanger the legitimate operation of gaming in Nevada. The Legislature found that:

> 1. The relationship which exists between a labor organization and the employees whom it represents in collective bargaining is such that it may significantly affect the conduct of a gaming operation by an employer.
>
> 2. In the past, attempts have been made by persons whose background is not suitable for association with licensed gaming to gain positions of control in labor organizations representing gaming casino employees in this state.
>
> 3. In order to carry out the declared policy of this state and that licensed gaming be conducted freely and honestly, and in order to protect the welfare of the employees of the gaming industry which is fundamental to the economy of this state, it is necessary to determine the suitability of any person who performs certain significant functions in the representa-

tion of gaming casino employees in this state.

Nev. Rev. Stat. § 463A.010 (1979).

This statute was enacted following extensive hearings before a joint meeting of the Nevada Senate and Assembly Judiciary Committees. Incorporated into the record of the Joint Committee's deliberations were the following items: (a) S. Rep. No. 187, 86th Cong., 1st Sess., 2318 (1959); (b) D. Cressy, Theft of the Nation (1969); and (c) President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (1967). Casino Employee Representative Licensing, Joint Hearing on S.B. 614 Before the Senate and Assembly Judiciary Committees, 58th Session (Nev. 1975). The committee heard extensive arguments from advocates on both sides of the issue. One representative of labor called the measure "responsible and responsive legislation. We're more worried than anybody about improper people in our industry. It's a good bill."

Reno Evening Gazette, May 13, 1975, at 13, col. 1 (statement of I.R. Ashleman II, attorney for Culinary Workers Local 226).

The requirements that Nevada imposed on labor organizations that represent gaming casino employees are very limited. Chapter 463A requires that such labor organizations file with the State Gaming Control Board a list of personnel who:

> (a) Adjust grievances for, negotiate or administer the wages, hours, working conditions or conditions of employment of any gaming casino employee;
>
> (b) Solicit, collect or receive any dues, assessments, levies, fines, contributions or other charges within this state for or on behalf of the organization from gaming casino employees; or
>
> (c) Act as officers, members of the governing body, business agents or in any other policymaking or supervisory position in the organization.

Nev. Rev. Stat. § 463A.030(1) (1979). As defined in Nevada's Gaming Control Act,

> "Labor organization" means an organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers of

gaming casino employees concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work of gaming casino employees.

Id. § 463A.020(4).

Gaming casino employee is defined as:

[A]ny person employed directly or indirectly in the operation of a gaming establishment under a nonrestricted license, including:

(a) All personnel involved in the operation of a casino gaming pit, such as dealers, shills, clerks, hosts, junket representatives and the supervisors of such persons;

(b) All personnel involved in handling money, such as cashiers, change persons, count teams, coin wrappers and the supervisors of such persons;

(c) All personnel involved in the operation of games, such as bingo and keno;

(d) All personnel involved in operating and maintaining slot machines, such as mechanics, floormen, change and payoff persons and the supervisors of such persons;

(e) All personnel involved in security, such as guards, games observers and the supervisors of such persons;

(f) All personnel involved in the operation of a race or sports book, such as writers, boardmen, cashiers and the supervisors of such persons;

(g) All personnel involved in the operation of a pari-mutuel operation licensed under chapter 464 of NRS and any sporting event on which such pari-mutuel wagering is conducted; and

(h) Such other persons whose duties are similar to the classifications set forth in paragraphs (a) to (g), inclusive, as the commission may from time to time designate by regulation, but does not include personnel whose duties are related solely to such nongaming activities as entertainment, hotel operation, maintenance and the preparation and serving of food and beverages.

Id. § 463A.020(3).

Thus, Nevada's statute is restricted to unions representing employees engaged in actual gaming activities, whereas New Jersey's is much broader in scope. N.J. Stat. Ann. § 5:12-93. See Opinion below, 709 F.2d at 818. The Third Circuit found "unpersuasive" the argument that state legislation, such as Nevada's, that is restricted to casino employees should not be preempted. Opinion below, 709 F.2d at 829. It is respectfully submitted that this dictum is premised on a mistaken reading of congressional intent. The majority below failed to rebalance

the respective interests in light of a more limited state involvement in labor affairs.

Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945), does not compel a different conclusion. In Hill, this Court invalidated a Florida statute that required licensing of all persons holding certain offices in all unions operating in the state. The instant case, on the other hand, involves more limited legislation directed at a single industry that historically has required the strictest regulation.

Nevada's law is even more limited and less intrusive. The registration requirement may be the total extent of the State's involvement with the gaming labor unions. A decision to investigate any of the listed personnel is discretionary with the State Gaming Control Board. The board may investigate any person listed if it has reason to believe that the public policy of the State so requires. Nev. Rev. Stat. § 463A.050 (1979). Any costs of such

an investigation are paid by the State. Id. § 463A.050(2).

If Nevada's State Gaming Control Board determines that a union official should be disqualified under the policy constraints of Nevada law, the Board must notify the official and the labor organization of the reasons for its recommendation, and allow the official a hearing to present a defense. Id. §§ 463A.060, .070.

Full procedural rights are accorded the official before the Nevada Gaming Commission. Id. §§ 463A.110-.170. The commission may disqualify any person from performing a listed function only if it finds that:

> He has been convicted in any jurisdiction of any crime involving moral turpitude or indicating a lack of business integrity or honesty, whether denominated a felony or misdemeaner.
>
> . . . He has made or caused to be made any statement in a document provided to the board or its agents or orally to a board member or agent in connection with an investigation or listing which was, at the time and in the light of the circum-

stances under which it was made, false or misleading.

. . . He is a member of or an associate of organized criminal elements. Identification as such a member or associate by any law enforcement agency, legislative body or crime commission constitutes evidence which may be considered by the Nevada gaming commission.

. . . His moral character and integrity, as evidenced by his prior conduct, are such as to create a reasonable belief that his performance of the specified function would not be consistent with the policy of this state that gaming be conducted freely and honestly or with the welfare of the employees of the gaming industry.

Id. § 463A.040.

Judicial review is available to any person aggrieved by a decision of the commission. Id. § 463A.180. Even after a notice of disqualification is entered, the commission will still have to seek an injunction from State district court to enjoin the official from performing the function from which he is disqualified. Id. § 463A.250. These judicial safeguards prevent any arbitrary or unwarranted infringement on national labor policy.

Thus, Nevada's statutes initially impose only a registration requirement, and permit further state action only in specific, limited situations, and only after due process has been afforded. Moreover, these minimal restrictions may be applied only to unions involved in a specific, uniquely situated industry.

The statutes are as narrowly drawn as they can be without sacrificing altogether the State's ability to exercise some control over persons involved in its most important and most strictly regulated industry. Accordingly, the State of Nevada respectfully urges that the states not be barred from exercising limited supervision of gaming union officers.

CONCLUSION

Congress has not deprived Nevada and New Jersey of the ability to regulate union officials in the gaming industry. The deeply rooted and vital interests of New Jersey and Nevada weigh in favor of permitting limited state disqualification standards respecting choice of

bargaining representatives and collection of dues. This limited state scrutiny of gaming employee labor organizations does not present an unacceptable risk to federal labor policy.

For the foregoing reasons, the State of Nevada respectfully requests that the Third Circuit's decision be reversed.

DATED: January 12, 1984.

Respectfully submitted,

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Nos. 83-498 and 83-573

IN THE

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OCTOBER TERM, 1983

G. MICHAEL BROWN, ETC. *et al.*,
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On Appeal from the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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On Appeal from the United States Court of Appeals for the Third Circuit

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MOTION BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The International Brotherhood of Teamsters (IBT) hereby moves for leave to file a brief as *amicus curiae* arguing that the decision of the United States Court of Appeals for the Third Circuit was correctly decided.

INTEREST OF THE IBT AND ISSUES TO BE COVERED IN ITS BRIEF AMICUS CURIAE

The IBT is an international union comprised of 715 affiliated local unions. The collective membership of the IBT's affiliates totals approximately 1.8 million working men and women.

The IBT represents workers in a wide variety of industries in all 50 states of this nation. This case involves the established federal labor law preemption doctrine. The conflict between the type of state and federal legislation at issue has already and will continue to have a severe impact on present and potential Teamster members. The IBT is vitally interested in preserving the federal right of employees to form and join labor organizations and freely select the collective bargaining representatives of their choice.

The IBT has a strong and legitimate interest in the consistent application of the principles of the labor law preemption doctrine. The IBT is concerned that if the states are permitted to regulate conduct which is clearly protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, a substantial and harmful conflict between state and federal regulatory schemes will result.

We stress that the federal labor law preemption doctrine is clearly established. The preemption standards provide that where the conduct sought to be regulated is actually or arguably protected by § 7 of the NLRA the conduct is preempted from state regulation. State legislation which establishes disqualification criteria for a labor organization's officials and agents regulates the employees' § 7 right to select the bargaining representatives of their choice. This form of state legislation limits the employees' choice of a representative because the state's judgment is substituted for that of the affected employees. In short, state legislation should not regulate, nor

condition the exercise of, activities which are protected by § 7 of the NLRA. The national labor policy requires that such conduct remain a subject of exclusive federal concern.

In our view, the court of appeals' decision in this case supports the national labor policy. This policy is served because the lower court's holding provides for the uniform administration and application of the federal labor laws and the rights provided therein. The function of the accompanying brief *amicus curiae* is to provide a succinct statement of our position in order to aid this Court in its consideration of these issues of critical importance to workers' rights.

CONCLUSION

For the above stated reasons, this motion for leave to file an *amicus curiae* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-498

G. MICHAEL BROWN, ETC. *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

No. 83-573

MARTIN DANZIGER, ETC., *et al.*,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

This brief *amicus curiae* is filed by the International Brotherhood of Teamsters (IBT) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

In the present case, the Third Circuit Court of Appeals held that the right of employees to select their collective bargaining representatives is expressly protected by § 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq. Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger, etc. et al.* 709 F.2d 815 (3rd Cir.), *prob. juris. noted*, 52 U.S.L.W. 3413 (U.S., Nov. 28, 1983) (Nos. 83-498 and 83-573) [hereinafter cited as *Local 54*]. Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983-1984), substantially and directly limits the employees' exercise of this right. It prohibits labor organizations from collecting dues from employees covered by the Act and administering employee benefit funds, if any officer, agent, or principal employee of the union is disqualified under the criteria in § 86. N.J. Stat. Ann. 5:12-86 (West Supp. 1983-1984). Under established preemption principles, state regulation of conduct protected by § 7 of the NLRA is preempted from state regulation. Consequently, the Third Circuit Court of Appeals was correct in holding that § 93 of the Casino Control Act is preempted by the NLRA, and is therefore unconstitutional under the supremacy clause of the United States Constitution. U.S. Const. Art. VI, cl.2.

1. Section 93 of the state law directly regulates the rights of employees under § 7 of the NLRA. Section 93 requires labor organizations to register with the Casino Control Commission, as a condition for serving as the collective bargaining representative of employees covered by the statute. This provision prohibits a labor organization from collecting dues, either for failing to register with the Commission, or for being disqualified under § 86 as incorporated by § 93. This statute prohibits the union and its designated representatives from functioning as the collective bargaining representative for casino hotel employees, except upon conditions fixed by the state. Ac-

cordingly, enforcement of § 93 of the Casino Control Act can result a forfeiture of recognized collective bargaining rights. *See Hill* v. *Florida, ex rel. Watson*, 325 U.S. 538 (1945). Therefore, this state regulation violates the employees' § 7 right to freely select their bargaining representative.

This Court's decisions require the preemption of state regulation of conduct protected by section 7 of the NLRA. In *Hill*, this Court addressed the specific issue presented in this case: whether the NLRA preempts a state from establishing disqualification criteria for bargaining representatives. 325 U.S. at 539. The Court analyzed the legality of a state statutory scheme similar to the Casino Control Act. It determined that the disqualification criteria of the Florida statute at issue "circumscribe[d] the 'full freedom' of choice which Congress said employees should possess." *Hill*, 325 U.S. at 541. Accordingly, *Hill* held that the state law was preempted by the NLRA. Its precedential force has not been modified by subsequent federal legislation or decisions of this Court.

In the Labor-Management Relations Act of 1947 (LMRA) 29 U.S.C. § 151, *et seq.*, Congress did not address the issue of disqualifying criteria for bargaining representatives. The LMRA preserved the rights of employees to freely select their bargaining representatives, the interests held federally protected and preempted from state regulation in *Hill*. Accordingly, the LMRA did not alter federal law regarding the eligibility to serve as a collective bargaining representative.

The Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401, *et seq.*, specifically addressed the issue of disqualification criteria for union officials. Section 504 establishes a list of disqualifying offenses barring service as a union officer, business agent or union employee. 29 U.S.C. § 504. The LMRDA preserved and complemented the authority of *Hill* v. *Florida's*

construction of § 7 of the NLRA and the federal preemption doctrine.

The case of *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), does not support the validity of state legislation establishing disqualification criteria for union officials. Although *DeVeau* upheld a state statute which regulated the employees' § 7 right to select a bargaining representative, *DeVeau* was a narrow decision which did not overrule *Hill*. In *DeVeau*, this Court clearly distinguished its decision from *Hill* on the basis that the state program in *DeVeau* had been expressly considered and approved by Congress as an interstate compact. As shown by later decisions of this Court, state legislation that regulates conduct protected by the NLRA is preempted, notwithstanding the assertion that the state law is a comprehensive general criminal statute not directed at labor-management relations. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971).

2. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, established a comprehensive legislative scheme for regulating employee benefit plans. The Act specifically provides that pension plan regulation is a matter of exclusive federal concern. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). Section 514(a) of ERISA provides that the Act "shall supercede any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). Section 93(b) of the Casino Control Act purports to regulate the administration of employee benefit plans. Therefore, this provision is preempted by § 514 of ERISA.

3. The imposition of additional penalties for the commission of crimes already prohibited by existing federal and state legislation is unnecessary. Congress has provided the federal government with the statutory authority to attack labor racketeering through labor and criminal legislation. Section 302 of the LMRA addresses the issue

of labor-management corruption. 29 U.S.C. § 186. Moreover, the LMRDA is a comprehensive scheme designed to protect membership rights in labor organizations. Section 504 of the LMRDA provides disqualification criteria for responsible union positions and criminal penalties for violation of the section. 29 U.S.C. § 504. Finally, § 411(a) of ERISA provides protection against corruption in the administration of employee benefit plans by establishing disqualifying criteria for officers and employees of employee benefit plans. 29 U.S.C. § 1111(a).

In addition to the federal labor laws, the federal government has applied the Hobbs Act, 18 U.S.C. § 1951, *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, to root out corruption in the context of labor related activities.

The states may prosecute racketeering abuses under their general criminal laws. The states cannot, however, infringe on the right of employees to select the bargaining representatives of their choice. This right is protected by § 7 of the NLRA and is a matter of exclusive federal concern. Accordingly, this interest can only be modified or regulated through congressional action. The labor law preemption doctrine requires that any state regulation of this conduct be struck down as unconstitutional.

ARGUMENT

I. CONDUCT WHICH IS PROTECTED BY § 7 OF THE NATIONAL LABOR RELATIONS ACT IS A MATTER OF EXCLUSIVE FEDERAL CONCERN AND PREEMPTED FROM STATE REGULATION

A. The Established Federal Labor Law Preemption Doctrine

In the present case, the Third Circuit Court of Appeals was correct in holding that the right of employees to select their collective bargaining representatives is expressly protected by § 7 of the NLRA. Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983-1984), substantially and directly limits the employees' exercise of this right. Established federal labor law preemption principles provide that state regulation of conduct protected by § 7 of the NLRA is preempted. Therefore, § 93 is unconstitutional under the supremacy clause of the United States Constitution. U.S. CONST. art. VI, cl.2.

The NLRA regulates and promotes the federal rights of employees to join labor organizations and select their bargaining representatives. Section 1 of the NLRA sets forth Congress' purpose to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Section 7 of the NLRA provides employees with the "right to self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. Employee self-organization and free choice are recognized federal statutory rights. *Local 54, supra*, 709 F.2d at 824.

The New Jersey Casino Control Act, N.J. Stat. Ann 5:12-1, *et seq.* (West Supp. 1983-1984), requires the licensing of casinos and casino employees. N.J. Stat. Ann. 5:12-89-90 (West Supp. 1983-1984). Moreover, the statute requires the registration of all casino hotel employees. N.J. Stat. Ann 5:12-91 (West Supp. 1983-1984). The labor provisions at issue are set forth in § 93 of the Act. Section 93(a) requires every labor organization seeking to represent employees who are registered or licensed under the Act and employed at a casino hotel to register with the Commission annually. N.J. Stat. Ann. 5:12-93(a) (West Supp. 1983-1984). Moreover, § 93(b) includes a disqualification provision which provides:

> No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. [N.J. Stat. Ann. 5:12-93(b) (West Supp. 1983-1984).]

The Casino Control Act contains a comprehensive enforcement scheme. A labor organization's failure to register constitutes a violation under § 86 and subjects the union to the penalties set forth in § 93(b). Morover, if the union or its agents, officers, or principal employees attempt to operate in a representative function without meeting the registration requirements of § 93(a), they are subject to the criminal penalties set forth in § 117 of the Act. N.J. Stat. Ann. 5:12-117 (West 1983-1984).

The disclosure requirements of § 93(a) may be enforced by the Commission with an order requiring appropriate disclosure. N.J. Stat. Ann. 5:12-107(c). (West Supp. 1983-1984). In addition, the Commission has contempt powers to enforce such orders. N.J. Stat. Ann. 5:12-107(c) (West Supp. 1983-1984).

This Court has repeatedly addressed the issue of whether a particular state regulation may coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress established in the National Labor Relations Act (NLRA), to govern labor management relations affecting interstate commerce. *Local 926, International Union of Operating Engineers* v. *Jones*, 75 L.Ed.2d 368 (1983). In *Local 926*, the Court's most recent preemption decision, the majority explained that the governing preemption doctrine was clearly established. Justice White speaking for the Court said:

> Our approach to the preemption issue has thus been stated and restated. First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. Although the [*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959)] guidelines [are not to be applied] in a literal, mechanical fashion, if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, *in the absence of compelling congressional direction*, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. [75 L.Ed.2d at 376-377 (emphasis added and citations omitted).]

This test reflects the critical inquiry in the preemption analysis, that is, whether the activities sought to be regu-

lated are actually or arguably protected by the NLRA, and thus within the central aim of Congress in enacting § 7 of the Act, or whether they are only of peripheral concern to the exercise of those rights Congress sought to protect. When the conduct at issue is specifically protected by § 7, there is no justification for engaging in any analysis involving the balancing or weighing of interests. A balancing test is only proper when there is an "absence of compelling congressional direction" regarding the federal concern over the conduct at issue. *Local 926*, 75 L.Ed.2d at 376, *citing Garmon*, 359 U.S. at 244. This is because the federal labor law "preemption doctrine finds its basic justification in the presumed intent of Congress." *Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 302 (1971).

Where, as here, Congress has acted through § 7 to protect specific activities in a clear and unequivocal manner, such conduct is preempted from state regulation. This position was articulated by this Court in *Garmon*, in which the majority stated:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state laws. [350 U.S. at 244.]

The broad *Garmon* preemption doctrine was designed to prevent conflict between state and federal regulatory schemes in the field of labor law. *Lockridge*, *supra*, 403 U.S. at 294-95.

The cases of *International Union, UAW* v. *O'Brien*, 339 U.S. 454 (1950), and *Amalgamated Association of*

Street, Electric Railway and Motor Coach Employees of America v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), demonstrate the Court's consistent application of the preemption doctrine in cases involving conduct protected under § 7 of the NLRA. In *O'Brien*, the Court found that § 7 safeguarded the right of employees to engage in concerted activities and "expressly recognized the right to strike," 339 U.S. at 457. Accordingly, the Court held that the strike vote provisions of the Michigan labor mediation law were preempted by § 7. The Court stated the controlling principle of its decision: "if 'Congress has protected the union conduct which the State has forbidden . . . the state legislation must yield." 339 U.S. at 459, *citing International Union, UAW*, v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 252 (1949).

The Court's analysis in *O'Brien* was followed in *Amalgamated*, where one issue presented here—whether a compelling state interest may permit state regulation of conduct protected by § 7—was directly addressed. There, the Court rejected the state's argument that uninterrupted essential public utility services, specifically, gas, electric, and transit services, constituted a crucial local concern which justified the state's regulation of the federal right to strike. 340 U.S. at 387, 397. The Court determined that the Wisconsin Public Utility Anti-Strike Law attempted to deny entirely the federal right to strike which Congress restricted to a very limited extent in case of national emergencies. 340 U.S. at 394. Therefore, the Court held that the NLRA and the LMRA preempted the state legislation purportedly dealing with state emergencies. 340 U.S. at 394.

In the present case, the state's interest in barring persons from serving as bargaining representatives is clearly less vital to the public's welfare than the state's interest in *Amalgamated*. *A fortiori*, the state's interest in the present case does not justify any analysis involv-

ing a balancing of competing interests, nor any regulation of § 7 rights by the Casino Control Act.

Section 93 of the Casino Control Act directly regulates, restricts, and violates the federal rights of employees under § 7 of the NLRA. Section 93 prohibits a labor organization from collecting dues, as the duly selected and certified bargaining representative,[1] for failing to register with the Commission or being debarred by § 86 as incorporated by § 93. These provisions violate the right of employees to freely select and maintain a bargaining representative. The purpose of the NLRA is to promote collective bargaining and "to protect the 'full freedom' of workers in the selection of bargaining representatives of their choice." *Hill* v. *Florida*, 325 U.S. 538, 541 (1945). Section 93 limits the employees' choice by requiring the labor organization's officers, agents, and principal employees to prove to the satisfaction of New Jersey that they measure up to the state standards of who may receive union dues from employees in the casino industry and function as a collective bargaining agent. This state law operates to effectively prohibit the union and its designated representatives from functioning as the collective bargaining representative in accordance with its duty under federal law, except upon conditions fixed by New Jersey. Accordingly, the state Commission has the power to render a duly selected and certified union ineffective as a bargaining agent.

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[1] The NLRB has consistently exercised jurisdiction over the casino industry. *Local 54, supra*, 709 F.2d at 825, *citing El Dorado, Inc.*, 151 N.L.R.B. 579 (1965). Moreover, the Board has asserted jurisdiction notwithstanding the assertion that it should not due to the extensive state regulation of legalized gambling, the states' concern with preventing criminal infiltration, and the argument that gambling is essentially local in character. *El Dorado, Inc.*, 151 N.L.R.B. 579 (1965). *See also, Mapes Hotel, Inc.*, 230 N.L.R.B. 61 (1977); *The Anthony Co.*, 220 N.L.R.B. 886 (1975), *enforced*, 557 F.2d 692 (9th Cir. 1977).

These provisions place the union in an untenable position which Congress could not have permitted. The union may retain the officials subject to disqualification and thereby be prohibited from receiving any dues from employees covered by the Act. This will render the union totally ineffective as a collective bargaining agent in the casino and hotel industries, and sharply diminish the union's ability to function in that capacity in other industries. In the alternative, the duly selected and certified union could continue to serve as the employees bargaining agent and receive their dues, but only if the union dismissed the officers subject to the disqualification provision. This would mean dismissal of officials chosen by the membership, even though they are eligible to serve as a matter of federal law. 29 U.S.C. § 504.

The New Jersey statute plainly limits the employees' full freedom of choice in selecting a bargaining agent since it permits the State of New Jersey to substitute its judgment for that of the affected employees. Accordingly, § 93 of the New Jersey statute affects the status of the employees' designated bargaining agent and causes a forfeiture of recognized collective bargaining rights. *See Hill*, 352 U.S. at 537. Plainly, this state law violates the right of employees under § 7 right to select the bargaining representatives of their choice.

B. Supreme Court Decisional Law Requires The Preemption Of State Regulation Of Conduct Protected By § 7 Of The NLRA

1. Hill v. Florida *Is Directly On Point*

The Third Circuit Court of Appeals' decision finds much support in *Hill* v. *Florida*, 325 U.S. 538, where this Court addressed the specific issue presented in this case, that is, whether the NLRA preempts a state statute establishing the disqualification criteria for bargaining representatives. *Hill* established that such legislation is preempted by the NLRA. The state statutory scheme in

Hill was very similar to the New Jersey statute at issue in the present case. Section 4 of the Florida statute provided that no one could be licensed as a union business agent who was not a citizen of the United States for more than 10 years, who had been convicted of a felony, or who was not a person of good moral character. Section 6 of the law required every labor union operating in the state to file a written report with the Secretary of State, disclosing its name, location, and names and addresses of its officers. Section 14 of the Act provided criminal penalties against persons and unions for violating the statute. 325 U.S. at 540.

The Court's majority concluded that the Florida law prohibited the union and its selected representatives from functioning as collective bargaining agents, except upon conditions established by the state. The Court stated that the disqualification criteria of § 4 "circumscribe[d] the 'full freedom' of choice which Congress said employees should possess." *Hill*, 325 U.S. at 541. Moreover, the Court held that the provision interfered with the collective bargaining process. Under § 4, if a properly selected union agent failed to obtain a license, the agent could be enjoined and subjected to contempt and criminal penalties for doing that which the NLRA required. *Id.* at 542. The Court concluded that § 4 was "an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress." *Id.*

The Court also held that § 6 was similarly preempted. It explained that if a labor organization failed to register properly, it could be enjoined from functioning as a labor union. The injunction would subject the labor organization to criminal punishment if it attempted to bargain on behalf of its members. *Id.* at 543. The Court determined that these sanctions created a barrier to collective bargaining which was inconsistent with the federally protected process of collective bargaining, stating the state and federal statutes could not "move freely

within the orbit of their respective purposes without infringing upon on another." *Id.* This Court's analysis and conclusion in *Hill* control the present case. The *Hill* decision has not been altered by subsequent legislation or rulings of this Court.

2. *Congress Did Not Alter the Principles Established by* Hill *In Enacting the LMRA and LMRDA*

In enacting the LMRA in 1947, Congress preserved the NLRA federal rights of employees to form unions and freely select their collective bargaining representatives. Section 7 was amended only by providing employees the "right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as recognized in section 8(a)(3)." Labor Management Relations Act of 1947, 29 U.S.C. § 157. The LMRA did not address the issue of disqualifying criteria for collective bargaining representatives. The Act preserved the interests which were held federally protected and preempted from state regulation in *Hill*—the right of employees to freely select their bargaining representatives. Accordingly, the LMRA did not alter federal law regarding the eligibility of unions to serve as collective bargaining representatives. *Local 54*, 709 F.2d at 826.

The 1959 LMRDA was designed to provide minimum standards for administering labor unions, while assuring only limited government intrusion into union affairs and preserving the subject as an exclusive federal concern. *See United Steelworkers of America* v. *Sadlowski*, 457 U.S. 102, 117 (1982). That objective was articulated in *Sadlowski*, in which this Court stated:

> Congress was guided by the general principle that unions should be left free to operate their own affairs, as far as possible. S. Rep. No. 1684, 85th Cong., 2d Sess., 4-5 (1958). It believed that only

> essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimum standards, individual members are fully competent to regulate union affairs. [457 U.S. at 117.]

In the LMRDA, Congress established specific disqualification criteria for union officials. Section 504(a) of the LMRDA provides a list of disqualifying offenses for serving as a union officer, business agent, or union employee. 29 U.S.C. § 504(a). The LMRDA preserved and complemented the authority of *Hill's* construction of § 7 of the NLRA and the federal preemption doctrine.

The LMRDA reflects a delicate balance between the employees' rights under § 7 of the NLRA, the states' authority to regulate criminal conduct in the field of labor relations, and the federal preemption doctrine articulated in *Hill* v. *Florida*. Section 603(b) of the LMRDA provides that nothing in the first six titles of the Act shall be construed "to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." 29 U.S.C. § 523(b). The Act recognizes the states' authority to regulate criminal conduct in Section 604 which provides:

> Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes. [29 U.S.C. § 524.]

Finally, the legislative history of § 504 indicates that Congress made clear its intent to preempt the field of regulating the standards for disqualification of union officials in limited circumstances. Senate Report No. 187 states:

> The provision in the bill [§ 305(a), the predecessor to § 504] is not conceived by the committee as additional punishment for the crimes mentioned in the section. The punishment of these kinds of crimes and the enactment of laws relating to them are and should be the province of the States. *This provision is designed to protect union members' and the public interest by establishing certain standards for persons holding union office—a matter within the purview of the Federal Government.* [S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong & Ad. News 2318, 2366 (emphasis added).]

3. DeVeau v. Braisted *Did Not Overrule or Dilute* Hill v. Florida

Petitioners' contention that *DeVeau v. Braisted*, 363 U.S. 144 (1960), supports the validity of state legislation establishing disqualification criteria for union officials results from a misreading of that case. *DeVeau* was a narrow decision which is wholly consistent with *Hill* v. *Florida*. In *DeVeau*, this Court clearly distinguished its decision from *Hill* on the basis that the state program in *DeVeau* had been expressly considered and approved by Congress as an interstate compact.

DeVeau involved the validity of § 8 of the New York Waterfront Commission Act of 1953. Section 8 set forth disqualification criteria for union officials in labor organizations covered by the Act. 363 U.S. at 145. The Act was the result of legislation by New York and New Jersey and a constitutional compact between the two states. The Act was submitted to Congress for approval under the requirement of Art I, § 10 of the U.S. Constitution. Congressional consent was "not perfunctory." 363 U.S. at 149. Congress independently investigated the problem which gave rise to the state legislation and hearings were conducted in the House and Senate. *Id.* Section 8 of the Act was enacted pursuant to explicit congressional authority to enact supplementary legislation in accord with the objective of the compact. In ap-

proving the compact, Congress provided: "the consent of Congress is hereby given to the compact set forth . . . and to the carrying out and effectuation of said compact, and enactments in furtherance thereof." 363 U.S. at 151.

In a plurality opinion by Justice Frankfurter, the Court held that § 8 of the Waterfront Act was not preempted by the NLRA. The Court did not overrule *Hill* v. *Florida*. In upholding the state legislation, the plurality repeatedly relied on the fact that Congress had carefully considered and expressly approved the state program. First, in attempting to ascertain Congress' likely reaction to § 8 of the state legislation, the Court stated: "[h]ere the States presented their legislative program to cope with an urgent local program to the Congress, and the Congress unambiguously supported what is at the core of this reform." 363 U.S. at 153. Secondly, the Court referred to Congress' rare and explicit authorization to enact supplemental legislation to the compact. Justice Frankfurter wrote:

> [I]t is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. *This provision of the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts.* Of all the instances of congressional approval of state compacts—the process began in 1791, Act of Feb. 4, 1791, 1 Stat 189, with more than one hundred compacts approved since—we have found no other in which Congress expressly gave its consent to implementing legislation. [363 U.S. at 154 (emphasis added).]

Finally, the plurality opinion articulated the critical and controlling distinction between *DeVeau* and *Hill*. The plurality explained:

> [I]t would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in § 8. The decision in *Hill v. Florida*, 325 U.S. 538, in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill v. Florida*, as it is here, *that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations*, to vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infesting a particular industry. [363 U.S. at 154-55 (emphasis added).]

Justice Brennan joined the plurality opinion only in its judgment that the decision of the court below be affirmed. Justice Brennan based his decision to join the plurality in its judgment on the fact that Congress had demonstrated its intent that the state legislation should stand despite the provisions of the NLRA. 363 U.S. at 160. Accordingly, *DeVeau* stands as a narrow exception to *Hill* v. *Florida*.

The Appellants and Amici Curiae Atlantic City Hotel Association and Playboy Hotel Casino essentially advance the argument that the labor law preemption doctrine, as developed in *Hill* and *Garmon*, should not apply because the Casino Control Act is a general, comprehensive statute designed to regulate the casino industry and not labor unions or labor-management relations in the industry. In *Lockridge*, 403 U.S. at 292, this Court rejected the argument advanced by the Appellants and Amici Curiae. Moreover, the Court refused to create a "general v. particular" exception to the labor law preemption doctrine. Justice Harlan stated for the Court:

> Pre-emption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper

> focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in *Garmon* itself. [403 U.S. at 292 (citation omitted).]

Lockridge established that the critical concern is the type of "conduct being regulated" and not the formal description of the regulation in issue. The Casino Control Act limits the employees' choice of a collective bargaining representative, and therefore regulates conduct clearly protected by § 7 of the NLRA. In light of this Court's decision in *Lockridge*, the Casino Control Act's regulation of conduct protected by the NLRA brings the New Jersey statute within the rigid strictures of the federal labor law premption doctrine.

II. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) PREEMPTS ALL STATE LEGISLATION RELATING TO EMPLOYEE BENEFIT PLANS

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.*, established a comprehensive legislative scheme for regulating employee benefit plans. The Act specifically addresses the preemption issue and establishes pension plan regulation as a matter of exclusive federal concern. *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). Thus, § 514(a) of ERISA provides:

> [The] provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. [29 U.S.C. § 1144(a)]

In *Alessi*, 451 U.S. 504, this Court, in a unanimous decision,[2] established the broad preemptive scope of § 514

[2] Justice Marshall wrote the opinion for the eight participating members of the Court. Justice Brennan did not participate.

of ERISA. This Court stated: "[t]his provision demonstrates that Congress intended to depart from its previous legislation that 'envisioned the exercise of state regulation power over pension funds,' *Malone* v. *White Motor Corp.* (plurality opinion), and meant to establish pension plan regulation as exclusively a federal concern." 451 U.S. at 523 (footnote and citation omitted).

Section 93(b) of the Casino Control Act is a state law which is preempted by § 514 of ERISA. Section 93(b) provides in relevant part:

> No labor organization . . . may administer any pension or welfare funds, if any officer . . . is disqualified in accordance with the criteria contained in section 86 of [the] act. [N.J. Stat. Ann. 5:12-93(b) (West Supp. 1983-1984).]

Section 93(b) is designed to regulate the administration of pension and health and welfare funds. The plain language of this provision indicates that it "relate[s] to any employee benefit plan" within the meaning of § 514 (a) of ERISA. 29 U.S.C. § 1144(a).

Moreover, ERISA makes clear that even indirect state regulation impacting on private pensions may encroach on this area of exclusive federal concern. *Alessi*, 451 U.S. at 525. Section 514(c)(2) of ERISA defines state to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. 1144(c)(2); *Alessi*, 451 U.S. at 525. Congress "clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi*, 451 U.S. at 525.

In light of the clear preemptive intent of § 514 of ERISA and this Court's broad construction of this provision in *Alessi*, § 93(b) of the Casino Control Act is federally preempted by ERISA.

III. THE IMPOSITION OF ADDITIONAL PENALTIES FOR THE COMMISSION OF CRIMES ALREADY PROHIBITED BY EXISTING FEDERAL AND STATE LEGISLATION IS UNNECESSARY

In the present case, § 93 of the Casino Control Act establishes disqualification criteria for collective bargaining representatives. This statute regulates conduct clearly protected by § 7 of the NLRA, a matter of exclusive federal concern. Therefore, this regulation is preempted by the NLRA. The illegality of this specific state provision, of course, does not mean that the states cannot legislate against labor racketeering within the existing, balanced relationship between federal and state legislation. Indeed, comprehensive schemes of federal and state legislation directed to the very concerns of § 93 of the Casino Control Act already exist.

A. Federal Labor Legislation

Congress has provided the federal government with the statutory authority to address the issue of labor racketeering through labor and criminal legislation. Labor-management corruption is expressly dealt with in the LMRA. Section 302 of the Act prohibits employers from paying and labor organizations or their officers from receiving money or other things of value. This prohibition is enforceable by criminal and civil penalties. 29 U.S.C. § 186.

The LMRDA was enacted in 1959 to establish a comprehensive scheme for the protection of membership rights in unions. The Act contains a Bill of Rights of Members of Labor Unions, 29 U.S.C. § 411; comprehensive reporting requirements, 29 U.S.C. §§ 431-41; regulation of the imposition of trusteeships over subordinate labor organizations, 29 U.S.C. §§ 461-66; the establishment of election procedures, 29 U.S.C. §§ 481-83; and protections in the form of fiduciary standards and responsibilities for officers, 29 U.S.C. §§ 501-04. *See United States* v. *Local 560, etc., et al.*, 550 F. Supp. 511, 516 (D. N.J. 1982).

Section 504 of the Act establishes disqualification criteria for responsible union positions and provides criminal penalties for violating the section. Any person who holds an office or position in violation of 504 is subject to criminal prosecution. Moreover, criminal sanctions may be imposed on any labor organization or officer who knowingly permits any person to assume or hold a position in violation of § 504(a). 29 U.S.C. §§ 504(a)-504(b).

The LMRDA contains several criminal prohibitions in addition to § 504. Section 501(c) prohibits any person from converting, stealing, or embezzling union assets. 29 U.S.C. § 501(c). Section 502 subjects union officers and employees to criminal penalties for violating the bonding requirements for a person in a position of trust with the responsibility of handling union assets. 29 U.S.C. § 502. Section 503(a) prohibits labor organizations from lending officers or employees over $2,000.00. 29 U.S.C. § 503(a). Section 503(b) prohibits labor organizations and employees from paying the fine of any officer or employee convicted of a willful violation of the Act. 29 U.S.C. § 503(b). *See* Cox, *Internal Affairs of Labor Unions Under The Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 824 (1960). Finally, extortionate picketing is outlawed by § 602. 29 U.S.C. § 522.

ERISA complements the LMRDA by providing protection against corruption in the administration of employee benefit plans. Section 411(a) provides that no person who has been convicted of, or who has been imprisoned as a result of his conviction of, a list of designated federal or state offenses, may serve as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or custodian to any employee benefit plan. 29 U.S.C. § 1111(a). This provision provides for a five year disqualification period, unless certain exceptions are satisfied. 29 U.S.C. § 1111(a). In addition to disqualifying persons from holding office or employment,

§ 411(a) prohibits any person from knowingly permitting any person from serving in a capacity in violation of § 411(a). Section 411(b) provides criminal penalties for any person who intentionally violates Section 411. 29 U.S.C. § 1111(b).

In drafting the disqualification provisions, Congress recognized the relationship between ERISA and the established federal legislative scheme governing labor relations. A review of § 504 of the LMRDA and § 411 of ERISA reveals that the two provisions were intended to be virtually identical. Moreover, § 411(a) includes a violation of § 302 of the LMRA and any violation of the LMRDA among the disqualifying offenses.

B. Federal Criminal Legislation

In addition to the federal labor laws, the federal government has utilized the Hobbs Act, 18 U.S.C. § 1951, *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, to attack corruption in the context of labor related activities.

The Hobbs Act forbids interference with commerce by extortion. The Act defines extortion to mean the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence or fear. . . ." 18 U.S.C. § 1951(b)(2). This Court and various courts of appeal have held that the Hobbs Act prohibits union officials from threatening force or violence against an employee in order to obtain personal payoffs,[3] as well as prohibiting unions from using the proscribed means to exact wage payments from employers in return

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[3] *See, e.g., United States* v. *Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Kramer*, 355 F.2d 891 (7th Cir.), *cert. granted in part and denied in part*, 384 U.S. 100 (1966); *Bianchi* v. *United States*, 219 F.2d 182 (8th Cir.), *cert. denied*, 349 U.S. 915 (1955), *cited in United States* v. *Enmons*, 410 U.S. 396, 400 n.4 (1973).

for imposed and superfluous services of workers.[4] *United States* v. *Enmons*, 410 U.S. 396, 400 (1973).

RICO was designed as a forceful weapon against organized crime's influence over legitimate interstate business. Project, *White Collar Crime: Second Annual Survey of Law*, 19 Am. Crim. L. Rev. 1973, 351 (1981). Congress intended that RICO provide a safeguard against organized crime's influence in organized labor. Senate Report No. 91-617 states:

> Closely paralleling its takeover of legitimate business, organized crime has moved into legitimate unions. (footnote omitted) Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here. [S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1968), *cited in Local 560*, 550 F. Supp. at 524.]

RICO prohibits a person from using income obtained through a pattern of racketeering activity to acquire an interest in an enterprise, 18 U.S.C. § 1962(a), acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(b), conducting or participating in the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. 1962(c), and conspiring to commit any of the above offenses, 18 U.S.C. § 1962(d). Project, 19 Am. Crim. L. Rev. at 353-354. RICO provides for criminal and civil

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[4] *See, e.g., United States* v. *Green*, 350 U.S. 415, 417 (1956); *United States* v. *Kemble*, 198 F.2d 889 (3d Cir.), *cert. denied*, 344 U.S. 893 (1952), *cited in United States* v. *Enmons*, *supra*, 410 U.S. at 400 n.5.

remedies. The federal government has applied the Act to labor officials in the criminal [5] and civil [6] context.

C. State Legislation

Racketeering may be prosecuted by the states through enforcement of their general criminal laws. Indeed, the LMRDA recognizes the states' traditional role in criminal law enforcement. Section 604 of the Act preserves the states' authority to enforce their general criminal laws against designated offenses. 29 U.S.C. § 524. Secondly, the States may exercise their traditional police powers to enact legislation to serve their specific purposes.

D. Conclusion

The instant case illustrates one limitation on the exercise by the states of their police powers. State legislation may not infringe on the federally protected right of employees to select the bargaining representatives of their choice. This right is protected by § 7 of the NLRA and is a matter of exclusive federal concern. Accordingly, this interest may only be modified or regulated through congressional action. This was recognized in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957), in which the Court stated:

> Congress kn[ows] full well that its labor legislation 'preempts the field that the [LMRA] covers insofar as commerce within the meaning of the Act is concerned' and demonstrated its ability to spell out

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[5] *See, e.g., United States* v. *Thordarson*, 646 F.2d 1323 (9th Cir.) (use of explosives and arson in labor extortion scheme), *cert. denied*, 454 U.S. 1055 (1981); *United States* v. *Scotto*, 641 F.2d 47, 50-51 (2d Cir. 1980) (union president in kickback scheme), *cert. denied*, 452 U.S. 961 (1981); *United States* v. *Provenzano*, 620 F.2d 985, 989 (3d Cir.) (complex kickback scheme to ensure "labor peace"), *cert. denied*, 449 U.S. 899 (1980); *United States* v. *Kaye*, 556 F.2d 855, 859 (5th Cir.) (pay fraud by union steward), *cert. denied*, 434 U.S. 921 (1977), *cited at Project*, 19 Am. Crim. L. Rev. at 353 n.1411.

[6] *United States* v. *Local 560*, 550 F. Supp. 511.

with particularity those areas in which it desired state regulation to be operative. [353 U.S. at 9-10, *quoting Amalgamated Assn. of Street Electric Railway & Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U.S. at 397-98.]

In the present case, § 93 of the Casino Control Act regulates the rights of employees under § 7 of the NLRA, an area of exclusive federal concern. Section 7 is the cornerstone of the national labor policy because it is the central source from which all employees' rights to organize and engage in concerted activity are derived. Congress, through federal labor legislation, expressly intended to occupy this critical area to the exclusion of the states. The NLRA and LMRA, passed by Congress pursuant to its authority under the commerce clause, constitute the supreme law of the land under Article VI of the constitution. *Amalgamated, supra*, 340 U.S. at 399. Because the New Jersey legislation at issue conflicts with Congress' will, as plainly expressed in federal labor legislation, it is preempted and therefore violative of the supremacy clause of the Constitution. U.S. CONST. art VI, cl.2.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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Dated: February 21, 1984

No. 83-498-AFX
Status: GRANTED

Title: G. Michael Brown, etc., et al., Appellants
v.
Hotel and Restaurant Employees and Bartenders International Union Local 54, et al.

Docketed:
September 23, 1983

Court: United States Court of Appeals for the Third Circuit

Vide:
83-573

Counsel for appellant: Parrillo, Anthony J., Genatt, Robert J.

Counsel for appellee: Katz, Bernard N.

Entry	Date	Note	Proceedings and Orders
1	Sep 23 1983	G	Statement as to jurisdiction filed.
2	Sep 23 1983		Appendix of appellant G. Michael Brown, et al. filed.
3	Oct 28 1983		Joint supplement to Jurisdictional Statement filed. VIDED
4	Oct 29 1983		Motion of appellees Hotel & Rest. Employs., et al. to affirm filed. VIDED.
5	Nov 2 1983		DISTRIBUTED. November 23, 1983
8	Nov 28 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 83-573, and a total of one hour is allotted for oral argument.
			**********
9	Jan 12 1984		Brief of appellants G. Michael Brown, et al. filed.
10	Jan 12 1984		Joint appendix filed. VIDED.
13	Jan 12 1984	G	Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae filed.
14	Jan 12 1984		Brief amicus curiae of Nevada filed.
15	Jan 12 1984	G	Motion of Atlantic City Casino Hotel Association, et al. for leave to file a brief as amici curiae in No. 83-573 filed.
16	Jan 23 1984		Motion of Atlantic City Casino Hotel Association, et al. for leave to file a brief as amici curiae in No. 83-573 GRANTED.
17	Jan 31 1984		Record filed.
19	Feb 1 1984		Order extending time to file brief of appellee on the merits until February 21, 1984.
20	Feb 10 1984		Record filed.
21	Feb 10 1984		Certified copy of partial proceedings and appendices received.
22	Feb 14 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (3rd case) This case is consolidated with No. 83-573. (1 hour)
23	Feb 21 1984		Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae GRANTED.
24	Feb 21 1984	G	Motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for leave to file a brief as amicus curiae filed.
25	Feb 21 1984		Brief of appellees Hotel & Rest. Employs., et al. filed. VIDED.
		*	(with separate appendix)
26	Feb 27 1984		CIRCULATED.

No. 83-498-AFX

Entry	Date	Note	Proceedings and Orders
27	Mar 5 1984		Motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
28	Mar 16 1984	X	Reply brief of appellants G. Michael Brown, et al. filed.
29	Mar 26 1984		ARGUED.